

PRODUCT LIABILITY ACT

HEARINGS
BEFORE THE
SUBCOMMITTEE ON THE CONSUMER
OF THE
COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE
NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 44

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A
UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

APRIL 6 AND 27, 1983

Serial No. 98-33

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PRODUCT LIABILITY ACT

WEDNESDAY, APRIL 6, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:33 a.m. in room SR-253, Russell Senate Office Building, Hon. Robert W. Kasten, Jr. (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: Marilyn S. Richmond and Lawrence R. Fullerton, staff counsels; and Amy L. Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The subcommittee will come to order.

I am pleased to open these hearings on S. 44, the Product Liability Act, to establish a uniform product liability law for the United States. The Product Liability Act represents the culmination of 7 years of effort to develop a uniform product liability law. S. 44 has evolved from the work of the Federal Inter-Agency Task Force on Product Liability, from House hearings held in the 96th Congress, and from full and complete hearings held by this subcommittee in the 97th Congress.

The Product Liability Act is identical to S. 2631 as reported favorably by this committee, the Senate Commerce Committee, on October 1, 1982. That legislation in turn was based on a series of draft proposals which were widely circulated for comments and in which many of you in this room have participated.

The structure is a balanced bill which will give clarity and structure to an area of the law that has been riddled with conflicts and with confusion. The subcommittee's extensive hearing record last year demonstrates that we are facing a product liability crisis of such proportions it has become a tremendous burden on interstate commerce. Jobs are being lost, businesses are failing, and the product liability insurance rates have skyrocketed.

Many companies are unable to secure affordable insurance, are forced to go bankrupt, and the adverse effects of that are obvious. One valid claim may be unrecoverable in a single judgment and may force the company out of business.

In addition, the number of product liability claims has risen dramatically in recent years. Just a few years ago, in 1973 there were fewer than 3,000 product liability claims filed in the Federal courts. This year over 9,000 claims were filed. We are talking about a 300-percent increase in just over a 5-year period.

Company after company, small business after small business in particular, testified before this subcommittee that the product liability problem continues and in fact is getting worse.

The law in the area of product liability generally is created by judges. As a result, the law varies from State to State and within one State from court to court. The law is constantly subject to change from case to case.

Insurers, unable to predict or measure potential risks of their insureds, set high product liability insurance rates. Product sellers have less incentive to develop new products or to improve the safety of old ones. The chaos in the law results in a lengthy litigation over what rules apply in each case, and the accompanying legal costs, which are exorbitant. One estimate is that 77 cents is spent in legal costs for every 66 cents in injured claims receipts. These legal costs have been passed on to consumers in the form of higher prices for products.

This status quo is undesirable for all concerned. It is undesirable for the claimant, it is undesirable for the product seller or the manufacturer, it is undesirable for the insurer, and, most important, it is undesirable for the consuming public.

I am convinced on the basis of testimony that the committee heard in the last Congress that uniform standards for the liability of manufacturers and product sellers for harm caused by defective products is vitally necessary, and that such legislation makes eminently good sense. If a product is unreasonably dangerous in design because the manufacturer failed to exercise reasonable care in the design of the product, then I believe the manufacturer should be held responsible for any harm resulting from that failure.

But in determining whether a manufacturer has met his responsibilities we should look to a national standard. The Product Liability Act attempts to integrate the liability of all of the responsible parties in a manner that reflects each party's proportionate responsibility for the harms.

I understand that there have been some very close votes in the Bar Association, but that broad sectors of the legal profession are now working with us to develop a fair and balanced Product Liability Act. And I intend to work with all interested to achieve that goal.

I am confident that today the majority of my colleagues on the Senate Commerce Committee and the majority of my colleagues in the Senate recognize the magnitude of the product liability problem and the need for Federal legislation. I am impressed in particular with the strong cosponsorship we have achieved on S. 44 and the bipartisan nature of that strong cosponsorship.

I am hopeful and I believe that we will move this legislation expeditiously to a vote, first in the committee and then in the Senate this session.

[The bill follows:]

98TH CONGRESS
1ST SESSION

S. 44

To regulate interstate commerce by providing for a uniform product liability law,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 26 (legislative day, JANUARY 25), 1983

Mr. BAKER (for Mr. KASTEN) (for himself, Mr. PERCY, Mr. GORTON, Mr. STAFFORD, Mr. HELMS, Mr. HATCH, Mr. LUGAB, Mr. GARN, Mr. NICKLES, Mr. QUAYLE, and Mr. GLENN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To regulate interstate commerce by providing for a uniform
product liability law, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE

4 SECTION 1. This Act may be cited as the "Product Lia-
5 bility Act".

6 DEFINITIONS

7 SEC. 2. As used in this Act—

8 (1) "claimant" means any person who brings a
9 product liability action, and if such an action is brought

1 through or on behalf of an estate, the term includes the
2 claimant's decedent, or if such an action is brought
3 through or on behalf of a minor, the term includes the
4 claimant's parent or guardian;

5 (2) "clear and convincing evidence" is that meas-
6 ure or degree of proof that will produce in the mind of
7 the trier of fact a firm belief or conviction as to the
8 truth of the allegations sought to be established; the
9 level of proof required to satisfy this standard is more
10 than that required under preponderance of the evi-
11 dence, but less than that required for proof beyond a
12 reasonable doubt;

13 (3) "commerce" means trade, traffic, commerce,
14 or transportation (A) between a place in a State and
15 any place outside of that State; or (B) which affects
16 trade, commerce, or transportation described in clause
17 (A);

18 (4) "express warranty" means any affirmation of
19 fact, promise, or description relating to a product;

20 (5) "harm" means (A) physical damage to proper-
21 ty other than the product itself; (B) personal physical
22 illness, injury, or death of the claimant; or (C) mental
23 anguish or emotional harm of the claimant caused by
24 the claimant's personal physical illness or injury;
25 "harm" does not include commercial loss;

1 (6) "manufacturer" means (A) any person who is
2 engaged in a business to design or formulate and to
3 produce, create, make, or construct any product (or
4 component part of a product), including a product
5 seller, distributor, or retailer of products with respect
6 to any product to the extent that such a product seller,
7 distributor, or retailer designs or formulates and pro-
8 duces, creates, makes, or constructs the product before
9 that product seller, distributor, or retailer sells the
10 product; or (B) any product seller not described in
11 clause (A) which holds itself out as a manufacturer to
12 the user of the product;

13 (7) "person" means any individual, corporation,
14 company, association, firm, partnership, society, joint
15 stock company, or any other entity (including any gov-
16 ernmental entity);

17 (8) "practical technological feasibility" means the
18 technical, medical, and scientific knowledge relating to
19 the safety of a product which, at the time of production
20 or manufacture of a product, was developed, available
21 and capable of use in the manufacture of a product,
22 and economically feasible for use by a manufacturer;

23 (9) "preponderance of the evidence" is that meas-
24 ure or degree of proof which, by the weight, credit,
25 and value of the aggregate evidence on either side, es-

1 establishes that it is more probable than not that a fact
2 occurred or did not occur;

3 (10) "product" means any object, substance, mix-
4 ture or raw material in a gaseous, liquid or solid state
5 which is capable of delivery itself, or as an assembled
6 whole in a mixed or combined state or as a component
7 part or ingredient, which is produced for introduction
8 into trade or commerce, which has intrinsic economic
9 value, and which is intended for sale or lease to per-
10 sons for commercial or personal use; "product" does
11 not include human tissue or organs;

12 (11) "product seller" means a person who, in the
13 course of a business conducted for that purpose, sells,
14 distributes, leases, installs, prepares, blends, packages,
15 labels, markets, repairs, maintains, or otherwise is in-
16 volved in placing a product in the stream of commerce;
17 but does not include—

18 (A) a seller of real property;

19 (B) a provider of professional services in any
20 case in which the sale or use of a product is inci-
21 dental to the transaction and the essence of the
22 transaction is the furnishing of judgment, skill, or
23 services; or

24 (C) any person who—

1 (i) acts in only a financial capacity with
2 respect to the sale of a product; and

3 (ii) leases a product under a lease ar-
4 rangement in which the selection, possession,
5 maintenance, and operation of the product
6 are controlled by a person other than the
7 lessor;

8 (12) "product user" means any person, including
9 the claimant's employer, who owns, operates, or has
10 control of a product;

11 (13) "reasonably anticipated conduct" means the
12 conduct which would be expected of a reasonably pru-
13 dent person who is likely to use or become exposed to
14 the product in the same or similar circumstances; and

15 (14) "State" means any State of the United
16 States, the District of Columbia, the Commonwealth of
17 Puerto Rico, the Virgin Islands, Guam, American
18 Samoa, the Northern Mariana Islands, the Trust Terri-
19 tory of the Pacific Islands, and any other territory or
20 possession of the United States.

21 **PREEMPTION OF OTHER LAWS**

22 **SEC. 3. (a)** This Act governs any civil action brought
23 against a manufacturer or product seller for loss or damage
24 caused by a product, including any action which before the
25 effective date of this Act would have been based on: (1) strict

1 or absolute liability in tort; (2) negligence or gross negli-
2 gence; (3) breach of express or implied warranty; (4) failure
3 to discharge a duty to warn or instruct; or (5) any other
4 theory that is the basis for an award for damages for loss or
5 damage caused by a product. Any civil action brought against
6 a manufacturer or product seller for harm caused by a prod-
7 uct is a product liability action.

8 (b) No person may recover for any loss or damage
9 caused by a product except to the extent that the loss or
10 damage constitutes harm. A civil action for loss or damage
11 caused to a product itself or for commercial loss is not a
12 product liability action, and shall be governed by applicable
13 commercial or contract law.

14 (c) This Act supersedes any State law regarding matters
15 governed by this Act.

16 (d) The district courts of the United States shall not
17 have jurisdiction over any civil action arising under this Act,
18 based on sections 1331 or 1337 of title 28, United States
19 Code.

20 **RESPONSIBILITY OF MANUFACTURERS**

21 **SEC. 4. (a)** In any product liability action, a manufactur-
22 er is liable to a claimant if—

23 (1) the claimant establishes by a preponderance of
24 the evidence that—

1 (A) the product was unreasonably dangerous
2 in construction or manufacture, as defined in sec-
3 tion 5(a);

4 (B) the product was unreasonably dangerous
5 in design or formulation, as defined in section
6 5(b);

7 (C) the product was unreasonably dangerous
8 because the manufacturer failed to provide ade-
9 quate warnings or instructions about a danger
10 connected with the product or about the proper
11 use of the product, as defined in section 6; or

12 (D) the product was unreasonably dangerous
13 because the product did not conform to an express
14 warranty made by the manufacturer with respect
15 to the product, as defined in section 7; and

16 (2) the claimant establishes by a preponderance of
17 the evidence that the unreasonably dangerous aspect of
18 the product was a proximate cause of the harm com-
19 plained of by the claimant.

20 (b) The claimant must introduce sufficient evidence to
21 allow a reasonable person, by a preponderance of the evi-
22 dence, to make the determinations specified in subsection (a).

23 (c)(1) A claimant may not establish any fact necessary to
24 make the determinations described in subsection (a) by show-
25 ing that the identical issue of fact was determined adversely

1 to the manufacturer in another action by another claimant
2 unless both actions were based on harm caused by the same
3 event in which two or more persons were harmed.

4 (2) A manufacturer may not establish any fact necessary
5 to make the determinations described in subsection (a) by
6 showing that the identical issue of fact was determined ad-
7 versely to another claimant in another action against that
8 manufacturer unless both actions were based on harm caused
9 by the same event in which two or more persons were
10 harmed and the claimant is the same as or is in privity with
11 the claimant in the other action.

12 PRODUCT CONSTRUCTION AND DESIGN

13 SEC. 5. (a) A product is unreasonably dangerous in con-
14 struction or manufacture if, when the product left the control
15 of the manufacturer, it deviated in a material way—

16 (1) from the design specifications, formula, or per-
17 formance standards of the manufacturer; or

18 (2) from otherwise identical units manufactured to
19 the same manufacturing specification or formula.

20 (b) A product is unreasonably dangerous in design or
21 formulation if, at the earlier of the time of manufacture or
22 Government certification of the product, a reasonably pru-
23 dent manufacturer in the same or similar circumstances
24 would not have used the design or formulation that the man-

1 ufacturer used. A product is not unreasonably dangerous in
2 design or formulation unless—

3 (1) the manufacturer knew or, based on knowl-
4 edge which was reasonably accepted in the scientific,
5 technical, or medical community for the existence of
6 the danger which caused the claimant's harm, should
7 have known about the danger which allegedly caused
8 the claimant's harm; and

9 (2) a means to eliminate the danger that caused
10 the harm was within practical technological feasibility.

11 (c) A product is not unreasonably dangerous in design or
12 formulation if the harm was caused by an unavoidably dan-
13 gerous aspect of a product. As used in this paragraph, an
14 "unavoidably dangerous aspect" means that aspect of a prod-
15 uct which could not, in light of knowledge which was reason-
16 ably accepted in the scientific, technical, or medical commu-
17 nity at the time of manufacture, have been eliminated with-
18 out seriously impairing the effectiveness with which the prod-
19 uct performs its intended function or the desirability, econom-
20 ic and otherwise, of the product to the person who uses or
21 consumes it.

22 (d) A product is not unreasonably dangerous in design or
23 formulation if the harm was caused by an unsafe aspect of a
24 product which was an inherent characteristic of the product
25 and which would be recognized by the ordinary person who

1 uses or consumes the product with the ordinary knowledge
2 common to the community.

3 (e) An alternative design or formulation is evidence that
4 a product was unreasonably dangerous in design or formula-
5 tion only if the claimant establishes that, at the time of the
6 manufacture of the product—

7 (1) the manufacturer knew or, based on knowl-
8 edge which was reasonably accepted in the scientific,
9 technical, or medical community for the existence of
10 the alternative design, should have known about the
11 alternative design; and

12 (2) the alternative design or formulation would
13 have—

14 (A) utilized only science and technology
15 which was reasonably accepted in the scientific,
16 technical, or medical community and which was
17 within practical technological feasibility;

18 (B) prevented the claimant's harm and pro-
19 vided equivalent or better overall safety than the
20 chosen design or formula. The overall safety of
21 the alternative design or formula is better than
22 the chosen design or formula if the hazards it
23 eliminates are greater than any new hazards it
24 creates for any persons and for any uses; and

1 (C) been desirable, functionally, economical-
2 ly, and otherwise, to the person who uses or con-
3 sumes it.

4 PRODUCT WARNINGS OR INSTRUCTIONS

5 SEC. 6. (a) A product is unreasonably dangerous be-
6 cause of the failure of the manufacturer to provide warnings -
7 or instructions about a danger connected with the product or
8 about the proper use of the product if—

9 (1) necessary warnings or instructions were not
10 provided, under subsection (b); or

11 (2) post-manufacture warnings or instructions
12 were not provided, under subsection (c).

13 (b) A product is unreasonably dangerous for lack of nec-
14 essary warnings or instructions if the claimant establishes by
15 a preponderance of the evidence that at the time the product
16 was sold—

17 (1) the manufacturer knew or, based on knowl-
18 edge which was reasonably accepted in the scientific,
19 technical, or medical community for the existence of
20 the danger which caused the claimant's harm, should
21 have known about the danger which allegedly caused
22 the claimant's harm;

23 (2) the manufacturer failed to provide the warn-
24 ings or instructions that a reasonably prudent manufac-
25 turer in the same or similar circumstances would have

1 provided with respect to the danger which caused the
2 harm alleged by the claimant, given the likelihood that
3 the product would cause harm of the type alleged by
4 the claimant and given the seriousness of that harm;

5 (3) the manufacturer failed to provide those warn-
6 ings or instructions to the claimant or to another
7 person in accordance with subsection (d)(1); and

8 (4) those warnings or instructions, if provided,
9 would have led a reasonably prudent product user
10 either to decline to use the product or to use it in a
11 manner so as to avoid harm of the type alleged by the
12 claimant.

13 (c)(1) A product is unreasonably dangerous for lack of
14 post-manufacture warnings or instructions if the claimant es-
15 tablishes by a preponderance of the evidence that—

16 (A) after the product was manufactured, the man-
17 ufacturer knew or, based on knowledge which was rea-
18 sonably accepted in the scientific, technical, or medical
19 community for the existence of the danger which
20 caused the claimant's harm, should have known about
21 the danger which allegedly caused the claimant's harm;
22 and

23 (B) post-manufacture warnings or instructions
24 would have been provided by a reasonably prudent
25 manufacturer in the same or similar circumstances,

1 given the likelihood that the product would cause harm
2 of the type alleged by the claimant and given the seri-
3 ousness of that harm.

4 (2) A product is not unreasonably dangerous under this
5 subsection if the manufacturer made reasonable efforts to
6 provide post-manufacture warnings or instructions to a prod-
7 uct user or to another person, in accordance with subsection
8 (d)(1).

9 (d)(1) A product is not unreasonably dangerous for lack
10 of either necessary or post-manufacture warnings or instruc-
11 tions if those warnings or instructions were provided to—

12 (A) a person, including an employer, who could
13 reasonably have been expected to assure that action
14 would be taken to avoid the harm or that the risk of
15 harm would be explained to the actual product user,
16 except where those warnings or instructions could be
17 readily attached by a reasonably prudent manufacturer
18 to the product itself in a form which could reach the
19 claimant;

20 (B) the using or supervising expert, where the
21 product involved is one which may be legally used only
22 by or under the supervision of a class of experts. For
23 purposes of this clause, warnings or instructions are
24 considered provided to the using or supervising expert
25 where the manufacturer employed means reasonably

1 calculated to make them available to the expert, and
2 this does not require actual, personal notice to the
3 expert; or

4 (C) the manufacturer's immediate buyer—

5 (i) where the product was sold as a compo-
6 nent or material to be incorporated into another
7 product and the claimant was exposed to the com-
8 ponent or material after it was incorporated or
9 converted into another product;

10 (ii) where the product was used in a work-
11 place and there was no practical, feasible means
12 of transmitting warnings or instructions directly to
13 the claimant; or

14 (iii) where the claimant was not an employee
15 of the manufacturer's immediate buyer and there
16 was no practical, feasible means of transmitting
17 the warnings or instructions to the claimant.

18 (2) A product is not unreasonably dangerous for lack of
19 warnings or instructions regarding—

20 (A) dangers that are obvious. As used in this
21 clause, "dangers that are obvious" are those of which
22 a reasonably prudent product user or a person identi-
23 fied in paragraph (1), if applicable, would have been
24 aware without a warning or instruction and dangers

1 which were a matter of common knowledge to persons
2 in the same or similar position as the claimant;

3 (B) the consequences of product misuse, as defined
4 in section 10(a)(2), or use contrary to warnings or
5 instructions available to the user or to a person identi-
6 fied in paragraph (1), if applicable; or

7 (C) the consequences of alterations or modifica-
8 tions, as defined in section 10(b)(2), of the product
9 which do not constitute reasonably anticipated conduct.

10 **PRODUCT EXPRESS WARRANTY**

11 **SEC. 7. (a)** A product is unreasonably dangerous be-
12 cause it did not conform to an express warranty if—

13 (1) the manufacturer made an express warranty
14 about a material fact relating to the safe performance
15 of the product;

16 (2) this express warranty proved to be untrue; and

17 (3) the failure of the product to conform to the
18 warranty caused the harm.

19 As used in this subsection, “material fact” means any specific
20 characteristic or quality of the product, but does not include a
21 general opinion about, or general praise of, the product or its
22 quality.

23 (b) A product may be unreasonably dangerous for failure
24 to conform to an express warranty although the manufacturer

1 did not engage in negligent or fraudulent conduct in making
2 the express warranty.

3 RESPONSIBILITY OF PRODUCT SELLERS

4 SEC. 8. (a) In any product liability action, a product
5 seller other than a manufacturer is liable to a claimant, if the
6 claimant establishes by a preponderance of the evidence
7 that—

8 (1)(A) the individual product unit which allegedly
9 caused the harm complained of was sold by the defend-
10 ant;

11 (B) the product seller failed to exercise reasonable
12 care with respect to the product; and

13 (C) such failure to exercise reasonable care was a
14 proximate cause of the claimant's harm; or

15 (2)(A) the product seller made an express warran-
16 ty, independent of any express warranty made by a
17 manufacturer as to the same product, about a material
18 fact directly relating to the safe performance of the
19 product;

20 (B) this express warranty proved to be untrue;
21 and

22 (C) the failure of the product to conform to the
23 warranty caused the harm.

1 (b) The claimant must introduce sufficient evidence to
2 allow a reasonable person, by a preponderance of the evi-
3 dence, to make the determinations specified in subsection (a).

4 (c)(1) A claimant may not establish any fact necessary to
5 make the determinations described in subsection (a) by show-
6 ing that the identical issue of fact was determined adversely
7 to the product seller in another action brought by another
8 claimant, unless both actions were based on harm caused by
9 the same event in which two or more persons were harmed.

10 (2) A product seller may not establish any fact neces-
11 sary to make the determinations described in subsection (a)
12 by showing that the identical issue of fact was determined
13 adversely to another claimant in another action against that
14 product seller, unless both actions were based on harm
15 caused by the same event in which two or more persons were
16 harmed and the claimant is the same as or is in privity with
17 the claimant in the other action.

18 (d)(1) In determining whether a product seller is subject
19 to liability under subsection (a)(1), the trier of fact may con-
20 sider the effect of the conduct of the seller with respect to the
21 construction, inspection, or condition of the product, and any
22 failure of the seller to transmit adequate warnings or instruc-
23 tions about the dangers and proper use of the product.

24 (2) A product seller shall not be liable under this Act
25 where there was no reasonable opportunity to inspect the

1 product in a manner which would or should, in the exercise of
2 reasonable care, have revealed the aspect of the product
3 which allegedly rendered it unreasonably dangerous.

4 (e) A product seller is liable for harm to the claimant
5 caused by a product in the same manner as the manufacturer
6 of the product if—

7 (1) the manufacturer is not subject to service of
8 process under the laws of the State in which the action
9 is brought; or

10 (2) the court determines that the claimant would
11 be unable to enforce a judgment against the manufac-
12 turer.

13 COMPARATIVE RESPONSIBILITY

14 SEC. 9. (a) All claims under this Act shall be governed
15 by the principles of comparative responsibility. Comparative
16 responsibility attributed to the claimant's conduct under sec-
17 tion 10(c) shall not bar recovery in a product liability action,
18 but shall reduce any damages awarded to the claimant in an
19 amount proportionate to the responsibility of the claimant.

20 (b) In any product liability action involving a claim of
21 comparative responsibility, the court, unless otherwise agreed
22 by all parties, shall instruct the jury to answer special inter-
23 rogatories (or, if there is no jury, the court shall make find-
24 ings) indicating (1) the amount of damages each claimant
25 would be entitled to recover if comparative responsibility

1 were disregarded and (2) the percentage of total responsibili-
2 ty for the claimant's harm to be allocated to each defendant,
3 to any third-party defendant, and to conduct defined in sec-
4 tion 10. For purposes of this paragraph, the court may deter-
5 mine that two or more persons are to be treated as a single
6 person.

7 (c) The court shall enter judgment against each party
8 determined to be liable in proportion to its percentage of re-
9 sponsibility for the claimant's harm, as determined under sub-
10 section (b)(2), unless section 11(a) requires a different result.

11 (d) If a claimant has not been able to collect on a judg-
12 ment in a product liability action, and if the claimant makes a
13 motion within 1 year after the judgment is entered, the court
14 shall determine whether any part of the obligation allocated
15 to a person who is a party to the action is not collectable
16 from such a person. Any amount of obligation which the
17 court determines is uncollectable from that person shall be
18 reallocated to the other persons who are parties to the action
19 and to whom responsibility was allocated and to the claimant
20 according to the respective percentages of their responsibili-
21 ty, as determined under subsection (b)(2).

22 MISUSE, ALTERATION, CONTRIBUTORY NEGLIGENCE OR
23 ASSUMPTION OF THE RISK

24 SEC. 10. (a)(1) If a manufacturer or product seller
25 proves by a preponderance of the evidence that misuse of a

1 product by any person other than the defendant manufacturer
2 or product seller and other than the claimant has caused the
3 claimant's harm, the determination in section 9(b)(2) shall re-
4 flect the percentage of total responsibility for the claimant's
5 harm allocable to misuse. Under this subsection, the trier of
6 fact may determine that the harm caused by the product oc-
7 curred solely because of misuse of the product.

8 (2) For purposes of this Act, misuse shall be considered
9 to occur when a product is used for a purpose or in a manner
10 which is not consistent with the warnings or instructions
11 available to the user, or which is not consistent with reason-
12 able practice of users of the product, or when a product user
13 fails adequately to train another person in the safe use of the
14 product, or otherwise provide for the safe use of the product,
15 and that lack of training or the failure otherwise to provide
16 for the safe use of the product was a cause of the claimant's
17 harm.

18 (b)(1) If a manufacturer or product seller proves by a
19 preponderance of the evidence that an alteration or modifica-
20 tion of the product by any person other than the defendant
21 manufacturer or product seller and other than the claimant
22 has caused the claimant's harm, the determination in section
23 9(b)(2) shall reflect the percentage of total responsibility for
24 the claimants' harm allocable to alteration or modification.
25 Under this subsection, the trier of fact may determine that

1 the harm arose solely because of the product alteration or
2 modification. The determination in section 9(b)(2) shall not be
3 made if—

4 (A) the alteration or modification was in accord-
5 ance with instructions or specifications of the manufac-
6 turer or product seller;

7 (B) the alteration or modification was made with
8 the express consent of the manufacturer or product
9 seller; or

10 (C) the alteration or modification was reasonably
11 anticipated conduct, and the manufacturer or product
12 seller failed to provide adequate warnings or instruc-
13 tions with respect to that alteration or modification.

14 (2) For purposes of this Act, alteration or modification
15 shall be considered to occur—

16 (A) when a person other than the manufacturer or
17 product seller changes the design, construction, or for-
18 mula of the product, or changes or removes warnings,
19 instructions, or safety devices that accompanied or
20 were displayed on the product; or

21 (B) when a product user fails to observe the rou-
22 tine care and maintenance necessary for a product and
23 that failure was the cause of the claimant's harm.

1 (3) Ordinary wear and tear of a product shall not be
2 considered to be alteration or modification of a product under
3 this subsection.

4 (c)(1) If a manufacturer or product seller proves by a
5 preponderance of the evidence that the conduct of the claim-
6 ant involving negligence, contributory negligence, or assump-
7 tion of risk has caused the claimant's harm, the determination
8 in section 9(b)(2) shall reflect the percentage of total respon-
9 sibility for the claimant's harm allocable to the claimant.
10 Under this subsection, the trier of fact may determine that
11 the harm arose solely because of the conduct of the claimant.

12 (2) For purposes of this Act, conduct of the claimant
13 involving negligence, contributory negligence, or assumption
14 of risk shall be considered to occur—

15 (A) when the claimant, while using the product,
16 was injured by a defective condition that would have
17 been apparent, without inspection, to an ordinary rea-
18 sonably prudent person;

19 (B) when the claimant knew about the product's
20 defective condition, and voluntarily used the product or
21 voluntarily assumed the risk of harm from the product;
22 or

23 (C) when the claimant misused, altered, or modi-
24 fied the product, as those terms are defined in subsec-
25 tions (a)(2) and (b)(2).

1 EFFECT OF WORKERS' COMPENSATION BENEFITS

2 SEC. 11. (a) In any product liability action in which
3 damages are sought for harm for which the person injured is
4 entitled to compensation under any State or Federal workers'
5 compensation law, and in which (1) the sum of the amount
6 paid as workers' compensation benefits for that harm and the
7 present value of all workers' compensation benefits to which
8 the employee is or would be entitled for the harm is greater
9 than (2) the sum of the amount proportionate to conduct de-
10 fined in section 10, the court shall enter judgment against the
11 defendant or defendants determined to be liable in an amount
12 equal to the amount of total damages to the claimant, as
13 determined under section 9(b)(1), less the amount of workers'
14 compensation benefits, as determined under this subsection.
15 If a person eligible to file a claim for workers' compensation
16 benefits has not filed such a claim, or either he or his employ-
17 er has failed to exhaust their remedies under an applicable
18 workers' compensation law, any product liability action
19 brought by the claimant shall be dismissed without prejudice
20 until those remedies are exhausted. The determination of
21 workers' compensation benefits by the trier of fact in a prod-
22 uct liability action shall have no binding effect on and shall
23 not be used as evidence in any other proceeding.

1 (b) Unless the manufacturer or product seller has ex-
2 pressly agreed to indemnify or hold an employer harmless for
3 harm to an employee caused by a product—

4 (1) the employer shall have no right of subroga-
5 tion, contribution, implied indemnity or lien against the
6 manufacturer or product seller if the harm is one for
7 which a product liability action may be brought under
8 this Act; and

9 (2) the workers' compensation insurance carrier of
10 the employer shall have no right of subrogation against
11 the manufacturer or product seller.

12 (c) In any product liability action in which damages are
13 sought for harm for which the person injured is entitled to
14 compensation under any State or Federal workers' compen-
15 sation law, no third party tortfeasor may maintain any action
16 for implied indemnity or contribution against the employer or
17 any coemployee of the person who was injured.

18 (d) No person entitled to file a claim for benefits pursu-
19 ant to applicable State or Federal workers' compensation
20 laws or who would have been entitled to file such a claim, or
21 any other person whose claim would be derivative from such
22 a claim, shall be allowed to recover in any action other than
23 a workers' compensation claim against a present or former
24 employer or workers' compensation insurer of the employer
25 or any coemployee for harm caused by a product.

1 TIME LIMITATION ON LIABILITY

2 SEC. 12. (a)(1) If any product is a capital good, no claim
3 alleging unsafe design or formulation as provided in section
4 5(b), or failure to give adequate warnings or instructions as
5 provided in section 6(a), may be brought for harm caused by
6 such a product more than 25 years from the date of delivery
7 of the product to its first purchaser or lessee who was not
8 engaged in the business of selling or leasing the product or
9 using the product as a component in the manufacture of an-
10 other product.

11 (2) As used in this subsection, "capital good" means any
12 product, other than a motor vehicle, or any component of any
13 such product, if it is also of a character subject to allowance
14 for depreciation under the Internal Revenue Code of 1954, as
15 amended, and was—

16 (A) used in a trade or business;

17 (B) held for the production of income; or

18 (C) sold, leased, or donated to a governmental or
19 private entity for the production of goods, for training,
20 for demonstration, or other similar purposes.

21 (b) Subsection (a) is not applicable if—

22 (1) the manufacturer or product seller intentional-
23 ly misrepresented facts about the product or fraudu-
24 lently concealed information about the product, and

1 that conduct was a substantial cause of the claimant's
2 harm;

3 (2) the harm of the claimant was caused by the
4 cumulative effect of prolonged exposure to a defective
5 product; or

6 (3) the harm, caused within the period referred to
7 in subsection (a), did not manifest itself until after the
8 expiration of that period.

9 (c) Nothing in subsection (a) shall affect the right of any
10 person who is subject to liability for harm under this Act to
11 seek and obtain contribution or indemnity from any other
12 person who is responsible for that harm.

13 PUNITIVE DAMAGES

14 SEC. 13. (a)(1) Punitive damages may be awarded to
15 any claimant who establishes by clear and convincing evi-
16 dence that the harm suffered was the result of the reckless
17 disregard of the manufacturer or product seller for the safety
18 of product users, consumers, or persons who might be
19 harmed by the product. Punitive damages may not be award-
20 ed in the absence of a compensatory award.

21 (2) As used in this subsection, "reckless disregard"
22 means conduct manifesting a conscious, flagrant indifference
23 to the safety of those persons who might be harmed by a
24 product and constituting an extreme departure from accepted
25 practice. A negligent choice among alternative product de-

1 signs or warnings, when made in the ordinary course of busi-
2 ness, does not by itself constitute "reckless disregard".

3 (b) The trier of fact, in determining under subsection (a)
4 whether punitive damages should be awarded, shall
5 consider—

6 (1) the manufacturer's or product seller's aware-
7 ness of the likelihood that serious harm would arise
8 from the sale or manufacture of a product;

9 (2) the conduct of the manufacturer or product
10 seller upon discovery that the product caused harm or
11 was related to harm caused to users or others, includ-
12 ing whether upon confirmation of the problem the man-
13 ufacturer or product seller took appropriate steps to
14 reduce the risk of harm;

15 (3) the duration of the conduct and any conceal-
16 ment of it by the manufacturer or product seller; and

17 (4) whether the harm suffered by the claimant
18 was partly the result of the claimant's own negligent
19 conduct.

20 (c) If the trier of fact determines under subsection (a)
21 that punitive damages should be awarded to a claimant, the
22 court shall determine the amount of those damages. In
23 making that determination, the court shall consider—

24 (1) all relevant evidence relating to the factors set
25 forth in subsection (b);

1 (2) the profitability of the conduct to the manufac-
2 turer or product seller; and

3 (3) the total effect of other punishment imposed
4 upon the manufacturer or product seller as a result of
5 the misconduct, including punitive damage awards to
6 persons similarly situated to the claimant and the se-
7 verity of other penalties to which the manufacturer or
8 product seller has been or may be subjected.

9 (d) Notwithstanding the provisions of section 14, a man-
10 ufacturer or product seller may introduce relevant evidence
11 of post-manufacturing improvements in defense of punitive
12 damages.

13 SUBSEQUENT REMEDIAL MEASURES

14 SEC. 14. (a) Except as provided in subsection (b), evi-
15 dence of any measure taken after an event, which if taken
16 previously would have made the event less likely to occur, is
17 not admissible.

18 (b) This section does not require the exclusion of evi-
19 dence of a subsequent measure in an action alleging a prod-
20 uct was unreasonably dangerous in design or formulation, if
21 offered to impeach a witness for the manufacturer or product
22 seller who has expressly denied the feasibility of such a
23 measure.

1 SEPARABILITY CLAUSE

2 SEC. 15. If any provision of this Act or the application
3 of it to any person or circumstance is held invalid, the re-
4 mainder of this Act and the application of the provision to
5 any other person or circumstance shall not be affected by that
6 invalidation.

7 EFFECTIVE DATE

8 SEC. 16. (a) This Act shall be effective 60 days after the
9 date of its enactment, and shall apply to all product liability
10 actions commenced on or after that date, including any action
11 in which the harm or the conduct which caused the harm
12 occurred before the effective date.

13 (b) If any provision of this Act would shorten the period
14 during which a manufacturer is exposed to liability under this
15 Act, the claimant may, notwithstanding the otherwise appli-
16 cable time period in section 12, bring any such action within
17 1 year after the effective date of this Act.

Senator KASTEN. I would like to welcome today's witnesses. We have representatives of various bar associations and distinguished law professors and practitioners from the bar, as well as representatives from the consumer organizations and the business community. I look forward to their testimony.

All of the witnesses understand that their prepared statements will be made a part of the record. We would ask each of you to summarize your prepared statement in 5 minutes or less, so that we will have an opportunity for exchange among the witnesses and also for questions from members of the committee.

There may be opening statements that other members of the subcommittee or the full committee have, and I ask unanimous consent that we would put those statements into the record when they become available to the committee.

The first panel is: Mr. Schwartz, Mr. Keeton, Mr. Sales, and Mr. Greenberg. Would you gentlemen come forward, please.

Gentlemen, we are going to try to keep rough track of the time with the light system. I think all of you are familiar with it. On yellow you have roughly 1 minute to go, and when it is on red you are on overtime.

Our first statement will be from Mr. Victor Schwartz, counsel to the Product Liability Alliance, an attorney in Washington, D.C. Mr. Schwartz.

STATEMENTS OF VICTOR E. SCHWARTZ, COUNSEL TO THE PRODUCT LIABILITY ALLIANCE; PROF. W. PAGE KEETON, SCHOOL OF LAW, UNIVERSITY OF TEXAS, AUSTIN, TEX.; JAMES B. SALES, COUNSEL, HOUSTON, TEX.; AND DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. SCHWARTZ. Thank you, Mr. Chairman. I am pleased to testify today on behalf of the Product Liability Alliance. The Product Liability Alliance is a broad-based coalition of over 250 businesses and trade associations representing large, medium, and small manufacturers, wholesaler-distributors, insurers and insurance agents and brokers, all of whom recognize the need for a product liability bill.

The Product Liability Alliance supports S. 44, the Product Liability Act. The background and the need for the act has been well established in prior hearings. Today I will be concentrating on the core part of the act, which is the basic liability standards that it contains.

Currently a single product liability action may be based on a variety of legal claims: negligence, strict liability in tort, implied and expressed warranty in contract, misrepresentation, and fraud. Each legal claim is distinct in theory and an action for a single harm may often be brought on several legal claims.

The availability of all these different theories is an accident of history, but it has had significant adverse effects. When multiple claims are alleged as a basis for recovery, parties to an action must plead, prove, and defend various technical elements of each claim. Because the various claims have their roots in both contract and tort law, there is considerable confusion over basic issues.

Dean Wade, a noted authority in the law of torts, has said: "When the plaintiff sues on more than one of those bases, issues and instructions become so complex and complicated that even the judge and the attorneys become confused—much less the poor jury." He has praised the single cause of action concept that is part of S. 44.

S. 44 combines all legal theories into a single product liability cause of action. The result is not only more efficient, it is conceptually sound. It recognizes that recovery for a product-related harm should not be tied to a particular legal theory. The focus should be on the type of defect that is involved and whether strict liability or fault is the appropriate standard for recovery.

S. 44 identifies four ways that product liability harm can be rectified. The first way is where the product is mismanufactured. This is the classic mouse in the soda bottle. The focus is on the product. The standard is clear. If there is a defect of this kind, the plaintiff recovers. It is clearer than the restatement of torts, which may make an issue as to whether the defect was reasonable or unreasonable.

The same approach is used with an express warranty. If someone says this glass will not shatter and it does, the defendant pays.

On the other hand, when we are dealing with two key areas of product liability law, S. 44 uses a fault base. It follows section 398 of the restatement, and that is the basis of reasonable care. Consider the following hypothetical. Suppose a lawnmower manufacturer in 1970 produces a very good lawnmower. In 1980 chemists develop a new type of grass. That grass gives off an acid that no one would have thought about when the lawnmower was manufactured. In 1986 the lawnmower deteriorates because of the exposure to this acid and a claim is brought.

No one, when the lawnmower was made, would know or have reason to know about the harm. Nevertheless, in a few jurisdictions today, an award could be granted even though the harm could not be anticipated by reasonable prudence. This is unusual because most decisions about the safe design of products are made by people throughout our law today when people make decisions they are judged by a negligence standard. Doctors, lawyers, engineers, people who design products, all of them are judged on the negligence base. The law looks at what could be done at the time the defendant acted.

There are three arguments that one should not use the negligence base in product liability with respect to the design of products. The first is that somehow this will remove motives for safety. But how can someone do more than act with reasonable prudence? How can you expect the impossible of individuals?

The second argument is that somehow negligence is difficult to prove. But it is proved against doctors, it is proved against engineers, it is proved against lawyers. It can also be proved against product sellers.

The third argument is based on the idea that somehow the defendant has more money and he should pay, he is the better "risk distributor." Well, then in every case I suppose you should get a financial statement from both the plaintiff and the defendant. If the issue is going to be the defendant pays, the tort system is not

the place to look. We might as well have a total compensation system.

Thank you, Senator, and I await your questions.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ, FOR THE PRODUCT LIABILITY ALLIANCE

Mr. Chairman, I am pleased to testify today on behalf of The Product Liability Alliance (TPLA). TPLA is a broad-based coalition of over 250 businesses and trade associations representing large, medium, and small manufacturers, wholesaler-distributors, insurers and insurance agents and brokers—all of whom recognize the need for a Federal product liability bill. TPLA supports S. 44, the Federal Product Liability Act.

The need for Federal legislation was fully documented during the 97th Congress in hearings before this Subcommittee¹ and in the report of the Commerce Committee on S. 2631.² As an attorney in private practice and as former chairman of the Federal Interagency Task Force On Product Liability, I am acutely aware of the product liability problem. In the late 1970's, the Task Force concluded, after an 18-month study, that uncertainties in the product liability tort litigation system were a principal cause of the problem. Those uncertainties work to the disadvantage of all parties. A state-by-state legislative approach to the problem has not relieved the uncertainties. It has made them worse. Federal legislative action is warranted.

My testimony this morning will not repeat the well-documented reasons a Federal product liability bill is needed. Instead, I will focus on the core structure of a bill designed to address the problems of uncertainties in the current system. First, a Federal bill should create a unified product liability cause of action. This will eliminate the unnecessary costs, complexities, and confusion currently associated with the multiple legal claims on which a single product-related action may be brought. Second, a Federal bill should set forth fair and workable standards of liability for a product-related harm. Clear standards of liability applied in all product liability cases will eliminate many of the uncertainties in the current law.

S. 44 achieves both goals. The heart of S. 44 is found in its creation of a unified product liability action and its standards of liability.

Currently, a single product liability action may be based on a variety of different legal claims—negligence, strict liability in tort, implied and express warranty in contract, misrepresentation, and fraud. Each legal claim is distinct in theory, and an action for a single harm may often be brought on several of the legal claims. The availability of multiple claims for a single product-related harm is an accident of history; it has had significant adverse effects.

Where multiple claims are alleged as a basis for recovery, parties to a product liability action must plead, prove, and defend the various technical elements of each claim. Further, because the various claims have their roots in both contract law and tort law, there is considerable confusion on basic issues, such as the recoverability of certain types of damages or the availability of certain defenses.³ Justice Traynor, one of the architects of product liability law, observed that the application of contract and sales law concepts to a product liability action creates "a booby-trap for the unwary."⁴ Other leading experts in the field, including Dean John W. Wade⁵ and Professor Page Keeton,⁶ have recognized that the multiple legal claims available for a single product-related injury complicate product liability tort litigation. Dean Wade noted that "[w]hen the plaintiff sues on more than one of those bases, issues and instructions become so complex and complicated that even the judge and the attorneys become confused—much less the poor jury."⁷ He has praised the single cause of action concept in S. 44.

The confusion and complexity in product liability litigation created by the use of multiple legal claims result in increased costs to all parties and to the judicial system. Because it is simply the result of the evolution of the law and has no ration-

¹ Product Liability Reform: Hearings on S. 2631 Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, Serial No. 97-109, 97th Cong., 2d Sess. (1982).

² S. Rep. No. 870, 97th Cong., 2d Sess. (1982).

³ See S. Rep. No. 670, 97th Cong., 2d Sess. 4, 22 (1982).

⁴ *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

⁵ Wade, "On Product 'Design Defects' And Their Actionability," 33 Vand. L. Rev. 551, 557 (1980).

⁶ Keeton, "Part I: Private Law, Torts," 34 Sw. L.J. 1, 4 (1980).

⁷ Wade, *supra* note 5, at 577.

al basis for continuing, this aspect of the product liability tort litigation system should be discarded in favor of a simpler and more efficient approach.

S. 44 does this. It combines all legal theories into a single product liability cause of action. The result is not only more efficient, it is also conceptually sound. It recognizes that recovery for a product-related harm should not be tied to a particular legal theory. Rather, the focus should be on the type of defect that is involved and whether strict liability or fault is the appropriate standard for recovery. This functional approach to product liability tort law, based on the type of defect involved rather than on the presence of technical elements of a particular legal theory, is a major step toward eliminating a costly and unnecessary aspect of uncertainty in the current system.

S. 44 identifies the four possible types of product defects which, if they cause a harm, are actionable—a manufacturing defect, a construction defect, a design defect, and a warning defect. By defining the four types of product defects, S. 44 achieves the second goal of a bill designed to eliminate uncertainties in the system: it sets forth fair and workable standards of liability for product-related harms.

Under S. 44, a manufacturing defect is a material deviation from the manufacturer's own product standards or expectations. (Section 5(a).) This is the classic mouse in the soda bottle case. The focus is solely on the product. If it has been mismanufactured or defectively constructed and that error in the manufacturing process causes a harm, the product is defective and the claimant recovers. The manufacturer is strictly liable for harms caused by a manufacturing defect, regardless of his fault or care.

The result is fair and rational. A jury can readily determine if the manufacturer has made an error in the manufacturing process and, thus, should be liable for harms caused by that error. A consumer has the right to expect that a product will not be mismanufactured—that there will not be a mouse or other harmful substance in the soda bottle. A manufacturer can expect to be liable for harms caused by the failure of its own quality control system to keep the mouse out of the bottle. The result will provide additional protection to consumers under the law of many states. There will no longer be any debate, as there would be under the Restatement (Second) of torts, as to whether a manufacturing defect is "reasonable" or "unreasonable."

S. 44 defines an express warranty defect as the failure of a product to meet a specific promise the manufacturer made regarding the safety of the product. (Section 7.) Again, the focus is on the product and whether the product's failure to meet the express warranty caused the harm. If so, the product is defective and the claimant recovers for his harm without proof of fault by the manufacturer. Strict liability has been widely recognized as the rule in express warranty cases. The focus is on a specific promise of safety about a product, such as, "this glass will not shatter." A jury can readily determine if the harm-causing product failed to meet the express warranty given. A consumer has a right to rely on a product warranty given by the manufacturer. A manufacturer can expect to be liable for harms caused by the failure of its product to meet an express warranty obligation.

S. 44 defines two other types of actionable product defects—design defects and warning defects. Unlike the definition of a manufacturing or breach of express warranty defect, these definitions do not focus on the product. The focus instead is on the conduct of the manufacturer. If the manufacturer used a design which would not have been used by a reasonably prudent manufacturer and if the design used caused the plaintiff's harm, the design is defective and the plaintiff recovers. (Section 5(b).) Similarly, in an action alleging harm caused by a defective warning, the plaintiff recovers if his harm is caused by the lack of warnings which a reasonably prudent manufacturer would have provided. (Section 6.) The issue in both cases is whether the defendant manufacturer was negligent or at fault, whether he failed to meet the standard of a reasonably prudent manufacturer.

The fault-based standard in design and warning cases follows Section 398 of the Restatement (Second) of Torts which states that manufacturers are liable for "failure to exercise reasonable care in the adoption of a safe plan or design." The authors of Section 402A, which sets forth the strict liability standard, did not intend that strict liability should extend beyond manufacturing defect cases to design and warning defect cases.* Many courts purport to apply 402A strict liability in design

* Wade, "A Conspectus of Manufacturers' Liability for Products," 10 Ind. L. Rev. 755, 756 (1977) ("the cases upon which Dean Prosser relied in preparing section 402A and adding it to the Restatement (Second) of Torts were primarily breach of warranty cases involving food products").

and warning cases, but in fact apply a negligence standard. As David Greenberg, Legislative Director of the Consumer Federation of America, recognized in his testimony last year: "[S]trict liability in design and failure to warn cases in practice amounts to a negligence standard. The decisions announce strict liability but apply a negligence test.⁹ The courts, in effect, recognize that a strict liability standard in design and warning cases is unfair, unworkable, and unjustifiable on policy grounds.

Consider the following hypothetical. A manufacturer designs and sells a lawnmower in 1970. The 1970 lawnmower incorporates all the best available and feasible safety technology. In 1970, no one in the lawnmower industry or other scientific, medical, or technical communities knows or has reason to suspect that the 1970 lawnmower had the potential to cause harm. In 1980, advancements in science and technology result in a new type of grass. Unknown to those who developed the new grass, it emits an invisible acid that erodes metal. This invisible acid gradually affects the 1970 lawnmower. In 1990, a metal blade splits, and the plaintiff is injured. This is the first time anyone could have realized that accidents of this type could occur. The plaintiff seeking to recover for harm caused by the 1970 lawnmower brings a design and warning defect case against the manufacturer. What should be the results?

If the lawnmower manufacturer were held strictly liable for the alleged design and warning defects, the law would hold him to a standard of liability not applied in analogous tort cases. Architects, physicians, engineers, lawyers, and others are not held to a standard of strict liability. They are liable only if their services or products cause a harm due to their failure to exercise reasonable care. An architect whose design falls below that which a reasonably prudent architect would use or a lawyer whose representation of his client falls below the standard of reasonable care is responsible for the consequences of his negligent conduct. With regard to product design and warning decisions, there is no reason to treat manufacturers differently. Such decisions do not occur in a vacuum; the process involves people making judgments in the very same way an architect or engineer makes judgments. Manufacturers should be treated under the same standards applicable to architects, engineers, doctors, lawyers, and others in our society: they should be responsible for the consequences of their negligent conduct. Any other standard singles manufacturers out for special and unfair treatment.

Further, a strict liability standard does not work in a design or warning case. In manufacturing and breach of express warranty cases, the standard of strict liability works because the jury can objectively determine if the harm-causing product differs from the product that the manufacturer intended to produce or warranted. For example, if the lawnmower blades were not properly bolted to the mower or if the mower failed to meet an express warranty, the jury can determine that objectively and hold the manufacturer liable for harms caused as a result regardless of whether he exercised due care. In design cases, by contrast, where the allegation is that all of the lawnmowers are defectively designed, there is no objective measure. As a result, strict liability would require the jury to focus on the mower design in the abstract without reference to an objective standard. Courts have floundered when they have attempted to formulate the test for strict liability in design and warning cases.¹⁰ A negligence standard is far more comprehensive to a jury than the esoteric strict liability standards created by some courts. The strict liability theory simply does not work in design and warning cases.

Thus, strict liability is unfair and unworkable in the lawnmower case and, indeed, in all design and warning cases. Nevertheless, proponents of pure strict liability would hold the lawnmower manufacturer strictly liable for the alleged design and warning defect—liable even though he did not know and in the exercise of reasonable care could not possibly have known in 1970 that the harm-causing event could occur. The conduct and knowledge of the lawnmower manufacturer in 1970 and the fact that he exercised all reasonable care are irrelevant under strict liability: today's knowledge of the risk is "imputed" to the past. Is it fair to judge a person's conduct by such a standard?

⁹ Product Liability Reform: Hearings on S., 2631, *supra* note 1, at 269 (Statement of David I. Greenberg).

¹⁰ See, e.g., Wade, "On Produce 'Design Defects' and Their Actionability," 33 Vand. L. Rev., 551, 576 (1980) ("At present, the question of 'design defects' and the determination of when a product is actionable . . . appears to be the most agitated and controversial question before the courts in the field of products liability."); 2 L. Frumer and M. Friedman, *Products Liability* § 16A[4][fiv][y] at 3B-136.2(b)(1982) ("courts are still striving to define a true strict liability design case, if there is such a thing").

Proponents of strict liability make three principal arguments. First, proponents argue a fault-based standard is "difficult or impossible to prove" in product cases and, therefore, bars recovery. Second, they argue strict liability is a better means of promoting accident prevention than is negligence. Third, they argue strict liability puts the risks of loss on the party best able to bear the loss. Let us evaluate each argument.

First, let us consider whether negligence is "difficult or impossible to prove."¹¹ A negligence or fault-based standard does not bar recovery for harms caused by defective designs or warnings. Plaintiffs have been meeting this standard every day for scores of years. They are able to prove negligence against doctors, lawyers, and airlines, as well as manufacturers. As I have indicated, negligence is the standard utilized for almost every activity in society. It is appropriate in product liability design and warning cases where the activity being examined is that of designers, engineers, and others who participate in design and warning decisions. Those decisions are analogous to decisions made in other types of negligence cases.

Second, let us consider whether a strict liability standard promotes accident prevention better than a negligence standard. Accidents caused by a defectively designed product can be prevented only if the dangerous aspect of the design is known or should have been known and can be eliminated. A negligence standard recognizes this and imposes liability on a manufacturer if a reasonable manufacturer knew or should have known of the danger and should have taken steps to avoid harm. Strict liability, by contrast, imposes liability even though the danger was unknown and not discoverable by reasonably prudent conduct. It holds a manufacturer to an unattainable standard—how can he prevent harms caused by dangers that are neither known or discoverable through the exercise of reasonable prudence. Under a strict liability standard, the incidence of liability may be increased, but it is extremely unlikely that the incidence of harm will be reduced beyond that achieved under a negligence standard.¹²

Where a manufacturer has acted with reasonable prudence and, thus, has done all that he can possibly do to prevent accidents, what more could strict liability add? A negligence standard in design and warning cases comports with our common understanding of sound, careful behavior—it is a good, workable mechanism for promoting safety and reducing accidents.

Third, let us consider the argument that the manufacturer should be strictly liable, because he is in the best position either to insure against the risk of loss or to pass the costs along to consumers in the form of higher product prices. The manufacturer can, it is argued, distribute and bear product-related losses better than the plaintiff can and, therefore, he should pay. Strict liability is not, however, the most efficient method of risk distribution. An individual who has personal health and wage loss insurance may be a far more efficient risk distributor than a manufacturer. Personal accident and health insurance return far more to victims per premium dollar than does product liability insurance. This suggests that the individual would be the most efficient risk distributor. We do not advocate this approach to product liability, because it would remove the element of individual responsibility for one's actions that is at the heart of tort law. We simply point out the fallacy in the risk distribution argument.

Even assuming that the manufacturer, as opposed to the plaintiff, is the most efficient risk distributor, that rationale for strict liability is inconsistent with fundamental tort law principles. It assumes that a manufacturer should be liable for a product-related harm, because he has a "deep pocket." The "deep pocket" approach to product liability suggests that compensation is always the goal where a person is injured by a product. This is inconsistent with traditional tort law that liability should be imposed only where responsibility for the harm can be proven. If compensation is the goal, it is inappropriate to distort tort law principles for that purpose. The mechanism for achieving it is outside the tort litigation system where damages can be strictly limited and the role of lawyers and judges is almost entirely eliminated.

¹¹ Proponents of strict liability assert that under a negligence standard a manufacturer can avoid liability for harms caused by a defective design by simply warning about the dangers associated with the defective design. This is not true. Consider, for example, a manufacturer who designs a fire extinguisher that will explode in a hot room. He cannot avoid liability for that defective design simply by issuing a warning: DO NOT USE THIS FIRE EXTINGUISHER IN A ROOM OVER 70 DEGREES. It would not be difficult to prove that a reasonable manufacturer would not have marketed such a product.

¹² See Keeton, "Products Liability—Some Observations About Allocation of Risks," 64 Mich. L. Rev. 1329, 1333 (1966) (it is "doubtful whether strict liability induces greater care than does negligence liability").

Professor Keeton has written that "[s]hifting losses . . . in every situation would be an arbitrary process."¹³ I agree with this statement. Yet, the risk distribution rationale for strict liability in design and warnings cases would achieve that result.

In sum, strict liability in design and warning cases treats manufacturers unfairly; that standard is not applied in any analogous tort case. The standard does not work in design and warning cases, because unlike manufacturing and breach of express warranty cases, it views the product design or warning in the abstract without a fair, objective measure for determining the existence of a defect. It changes the atmosphere of the courtroom, because the focus will no longer be on the responsibility of the defendant. Rather, the jury will be asked to engage in intellectual Monday morning quarterbacking. This is an unfair and irrational approach to product liability law because, after an accident, one can always say that a better warning or different design could have been provided. Our judicial system should be guided by more rational standards.

On behalf of TPLA, I commend this Subcommittee for its interest in developing Federal legislation that will effectively and fairly eliminate the current aspects of uncertainties in the product liability tort litigation system. S. 44 provides a unified product liability cause of action and adopts a strict liability standard for harms caused by manufacturing and express warranty defects and a negligence standard for harms caused by design and warning defects. This core structure of S. 44 follows the pattern suggested by the Federal Interagency Task Force, implemented in the Uniform Product Liability Act (UPLA), approved in the public comment process on UPLA, adopted by members of the House of Representatives in the 96th Congress who drafted H.R. 7912, and used in every subsequent Federal legislative proposal in both the House and the Senate. This core structure is a significant step toward resolving the problems of the current system.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question 1. Opponents of Federal legislation assert that it will not achieve uniformity. In fact, they argue that S. 44 uses new concepts which will result in years of confusion and that the various courts will interpret the statutory language differently. What are your thoughts?

Answer. S. 44 will achieve far greater uniformity than we have in the present system. The rules, succinctly stated and clearly understood, will be applied by all courts in every product liability action. Testimony before your committee has clearly shown that on each major issue of product liability law, there is at present a wide diversity of opinion.

S. 44 uses traditional tort law language, such as "reasonably prudent person in the circumstances," that common law courts have developed and with which judges and practitioners are familiar. Further, with respect to each major issue—construction defect liability, design defect liability, duty to warn liability, express warranty liability, product users responsibility, punitive damages—the bill establishes one uniform rule of law. Under the present system, courts look in any direction they want in creating product liability law. They have even resorted to journals written by persons who have little or no experience whatsoever in the law of torts. If S. 44 is not enacted, this diversity will become even wider. By way of contrast, under S. 44, courts will look at the statute and the accompanying report. The pattern will be similar to that followed under the Federal Rules of Evidence. No one suggests that the Federal Rules of Evidence should be repealed or that we should return to the confusion of the common law.

Question 2. It is your view that strict liability in design and warning cases departs from fundamental principles of tort law because it is based on an "economic risk distribution" rationale rather than on a concept of fault. Would you care to elaborate?

Answer. Strict liability in design and warning cases does depart from fundamental principles of the law of torts. Two basic predicates of the law of torts are the principles of individualized responsibility and fault. Tort law departs from the principle of fault only where there is a clear showing that departure is appropriate. Even in those cases, individual responsibility is still the touchstone. For example, under Section 402(A) of the Second Restatement of Torts, tort law departs from the

¹³ Keeton, "Products Liability—The Nature and Extent of Strict Liability," 1964 U. Ill. L.F. 693, 693.

principle of fault, because it is deemed appropriate to impose strict liability on manufacturers for harms caused by construction defects. When there is a construction defect or manufacturing flaw in a product, such as a mouse in a soda bottle, the defendant manufacturer has almost certainly been negligent, because it may be very difficult to prove negligence, i.e., how the mouse got into the soda bottle. Section 402(A) suggest a strict liability standard. Traditional tort law has followed this standard of strict liability in a manufacturing defect case. Similarly, where violation of an express warranty given by the defendant causes a harm, courts follow a standard of strict liability without fault but adhere to the principle of individualized responsibility. Where the defendant makes an express promise about the safety of his product, the plaintiff relies on it, and that reliance was misplaced, because the warrant was untrue, strict liability is imposed.

Strict liability in design or warning defect cases takes us far afield not only from fault but also from individualized responsibility. After an accident has happened, we can almost always see a better way to design or warn about a product. The knowledge we have only after an accident has happened, however, was not available when the manufacturer was making design and warning decisions. There is no basis for inferring he was negligent, such as there is in construction and express warranty defect cases. What we create, if we impose strict liability in design and warning cases, is a totally open-ended system of liability that departs from fundamental tort law concepts of individualized responsibility and fault.

Some have attempted to justify this departure under the theory of "economic risk distribution". This argument is that liability is appropriate, because the defendant is somehow better able to distribute the cost of the risk than the plaintiff is able to absorb it. This rationale, which is appropriate in a statutorily-created compensation system, is wholly inappropriate in the law of torts. The law of torts is based on wrongdoing—under tort law plaintiffs are compensated even when they already have received damages for their harm from another source. They also receive damages for what is called "pain and suffering". The historical roots of that type of compensation are based on the wrongdoing of the defendant. Risk distribution ignores these elements and also ignores the fact that the plaintiff, rather than the defendant, is sometimes the better risk distributor. The plaintiff may have been fully compensated through accident and health insurance, while the defendant may be unable to obtain or afford insurance.

Question 3. Strict liability in every kind of product case will mean, in effect, that the manufacturer always pays. Isn't this an argument for a no-fault system under which there are no litigation costs? (If No—When would the manufacturer pay and when wouldn't he pay?)

Answer. S. 44 is a product liability tort law bill, providing rules of law for cases in the tort litigation system. S. 44 provides rules of liability to be applied by the judge and jury. It is not appropriate for a tort law bill to do more than tort law is designed to do.

It may be appropriate, however, in some situations to establish through separate legislation a no-fault compensation system. This may be particularly true where large numbers of similar claims are clogging the litigation system, i.e., 15,000-20,000; where the tort litigation system however constructed might cause manufacturers to go out of business; or where there are special proof problems for both plaintiff and defendant, i.e., difficulties in identifying who made the product. When a compensation system is set up, strict liability should be the liability basis, and damages should be limited to true out-of-pocket losses. Under such a system, those who pay should be those who ultimately are causally responsible for the harm suffered by the plaintiff.

Question 4. Opponents of S. 44 assert that the bill is a bail-out for businesses, and that its standards turn the clock back to unfair standards of the past. Would you care to comment?

Answer. S. 44 does not bail out any business. It holds businesses strictly responsible for all harms caused by construction defects and for all harms caused by breach of express warranties. The bill holds businesses responsible for harms caused by a design or warning defect if they have failed to act as reasonably prudent manufacturers or product sellers in the same or similar circumstances. It creates incentives for risk prevention by placing responsibility on the party or parties who can best accomplish that goal. The statute of repose in the bill will not apply to or cut off claims relating to consumer products or to any type of latent injury. The statute of repose applies only to harms caused by a capital good is more than 25 years old. Data show that there are only a miniscule number of such cases and that the majority are won by the defendant.

The bill does not turn the clock back to unfair standards of the past. It often selects the most modern tort law rule available. For example, it proposes a pure comparative fault system with respect to contributory negligence, assumption of risk, and misuse of products. It also provides for punitive damages in appropriate product liability cases, including wrongful death cases. This is currently the rule in only a few states. Rather than turn up the clock backward or forward, the bill seizes rules that are based on fairness for all parties.

Question 5. Some people argue that most states have adopted strict liability in design defect cases, yet others argue that negligence is the traditional rule. Can you explain the divergent views?

Answer. The divergent views on the subject do not surprise me. A number of courts have used the term "strict liability" in design defect cases, but in fact have applied a negligence standard of liability. For example, the Supreme Court of West Virginia has said: "[T]he general test for establishing strict liability in tort is whether the involved product is . . . not reasonably safe for its intended use. The standard of reasonable safety is determined . . . by what a reasonably prudent manufacturer's standards should have been at the time the product was made." *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E. 2d 666 (1979).

Almost all tests for liability applied in the design area are based on negligence. Courts either look to what a reasonably prudent manufacturer would have done in the circumstances or attempt to balance risk that the product might cause the harm against the utility of the product. An overwhelming number of courts apply those negligence-based standards as of the time the product was manufactured. While courts sometimes state that they are testing "the product", they are really testing the conduct of the manufacturer. Negligence does not exist in the abstract.

The best way to clarify this area is to focus on the conduct of the defendant and whether that conduct was reasonably prudent. This is the standard applicable to doctors, engineers, and all other professions. People who manufacture products are just that, people. They are engaged in a professional process of manufacturing products. There is no reason to apply to manufacturers a standard of liability that differs from the standard applied to other professionals. S. 44 will clarify the confusion created by a misinterpretation of the Second Restatement of Torts. Section 402(A) of the Restatement document was founded on construction defects, not on design or warning liability. When courts attempted to stretch it to design and warning liability, they often stumbled and felt they had to come up with new tests. These new tests turned out, as I have indicated, to be negligence tests in one form or the other.

QUESTION OF SENATOR DANFORTH AND ANSWER THERETO

Question. S. 44 provides that a product is unreasonably dangerous in design or formulation if a "reasonably prudent manufacturer in the same or similar circumstances" would not have used that design or formulation. S. 44 further provides that a product is not unreasonably dangerous unless "the manufacturer knew, or based on knowledge which was reasonably accepted in the scientific, technical, or medical community of the existence of the danger which caused the claimant's harm, should have known about the danger." Will these provisions create disincentives for safety by allowing a manufacturer to lag behind in safety developments?

Answer. No. As explained in the Senate Commerce Committee Report on S. 2631, the "reasonably prudent manufacturer in the same or similar circumstances" phrase will not permit a manufacturer to avoid liability by arguing that it met the standard followed by the industry. The test is what was reasonable in the circumstances not what was the prevailing practice of the industry. See S. Rep. No. 97-670 at 28-29.

The distinction between what was reasonable and what was the prevailing industry custom is well-recognized. The Restatement (Second) of Torts provides that "whenever a reasonable [person] would depart from the custom" the actor may be negligent in conforming to the custom.¹ Case law, too, recognizes the distinction and the principle that a manufacturer may be held liable even if it met the standard of the industry.² Dean Prosser explained:

¹ Restatement (Second) of Torts, § 295A, comment c.

² See, e.g., *Forrest City Machine Works, Inc. v. Aderhole*, 616 S.W.2d 720 (Ark. 1981) (compliance with industry custom is not a defense); *Chaney v. Whiting Corp.*, 298 N.W.2d 681 (Mich. App. 1981) (question is whether the industry standard was reasonable); *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933 (Tex. Civ. App. 1967) (custom of the industry would not be controlling on the issue of due care in design); *Marsh Wood Products Co. v. Babcock & Wilcox*, 240 N.W. 392 (Wis. 1932).

"Even an entire industry by adopting such careless methods to save time, effort or money, cannot be permitted to set its own controlled standard. The fact that all other beverage bottlers use the same slipshod methods cannot serve as absolution for the bottler who is being sued. And if the only test is to be what has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety."³

A manufacturer has a duty to remain informed about design dangers and potential product developments.

"[T]he manufacturer of goods to be sold to the public . . . [is] charged with the duty of the affirmative action which would be taken by a reasonable man in [its] position, to discover dangers of which [it] may not be informed."⁴

A reasonably prudent manufacturer will met this obligation. Thus, a manufacturer, who purposefully closes it eyes to knowledge that a reasonably prudent manufacturer would have, cannot argue that it acted with reasonable prudence.

The duty to remain informed is incorporated not only in the reference to a "reasonably prudent manufacturer"; it is also incorporated in the reference to "knowledge reasonably accepted in the scientific, technical, and medical community." By imputing to the manufacturer knowledge that is reasonably accepted in the learned communities, the bill ensures that a manufacturer is not shielded from liability by remaining ignorant of knowledge it reasonably should have had.

Knowledge is imputed, however, only if there is a reasonable basis for doing so. In this respect, the bill recognizes that a manufacturer is not obligated to and, in fact, cannot know every maverick scientific or technical development.⁵ Rather, only knowledge that has some credible assurance of accuracy by having been "reasonably accepted" in the relevant community is knowledge that a reasonably prudent manufacturer would have and, thus, knowledge that the defendant manufacturer is deemed to have.

In sum, the reference to "knowledge reasonably accepted in the scientific, technical and medical community" recognizes the manufacturer's duty to keep abreast of new developments and to manufacture safer products in light of those developments. Neither this nor the "reasonably prudent manufacturer" standard create disincentives for safety. On the contrary, the concepts acknowledge the duty to act prudently in light of knowledge about the product that was reasonably accepted as accurate.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. Under Section 10 of the bill, a product seller would not be liable to the extent that the injury caused by its product was attributable to the alteration or modification of the product on the part of the third party unless such alteration or modification was "reasonably anticipated conduct." Which states currently use the concept of "reasonably anticipated conduct" in their body of product liability rules? Could you provide citations to cases which use the "reasonably anticipated conduct" standard? Would use of this concept inject confusion into the current tort litigation system?

Answer. The use of the "reasonably anticipated conduct" standard developed out of the 18-month study of product liability conducted by the Federal Interagency Task Force on Product Liability. It was reflected and used in the Uniform Product Liability Act. It has been included in the statutory product liability law of the state of Arizona. Ariz. Rev. Stat. Ann. § 12-681(4) (Supp. 1978). A similar concept is reflected in the case law of New Hampshire. See *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978).

Rather than inject confusion into the current tort litigation system, this concept will help eliminate it. Under current case law in a number of states, manufacturers are responsible for harms caused by alteration and modification of products that are "foreseeable". While this concept might seem fair in the abstract, in application it has resulted in the very opposite of foreseeability. It has been "foreseen" that adolescents would pour perfume on a Christmas candle. *Moran v. Faberge*, 332 A.2d 11 (Md. 1975). It has been foreseen that two men would place a hot air balloon in a

³ W. Prosser, "The Handbook of the Law of Torts" § 33 at 167 (4th ed. 1971).

⁴ *Id.* § 32 at 160-61. See also *Borel v. Fibreboard Products Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *Howard v. Avon Products, Inc.*, 395 P.2d 1007 (Colo. 1964) ("bound to keep reasonably informed of scientific knowledge and discoveries in his field").

⁵ See *Maxted v. Pacific Car & Foundry Co.*, 527 P.2d 832 (Wyo. 1974).

clothes dryer. *American Laundry Machinery Industries v. Horan*, 412 A.2d 407 (Md. App. 1980).

The words "reasonably anticipated conduct" constitute a clear signal to courts that product sellers are not responsible for every conceivable alteration or modification of a product. They focus on what is reasonably anticipated. As the Uniform Product Liability Act suggested, this will help place fairness in product liability law without creating any unfairness to persons who use products.

Question. It frequently has been asserted that increases in the cost of product liability insurance and in the number and size of product liability judgments have led manufacturers to go out of business. Would you please provide any studies, statistics, or references to studies which support these assertions? Also, could you please provide any specific examples of firms that went out of business as a result of product liability problems, and as much information as possible about the firm, including the name of the firm, the year the firm ceased its business operations, the type of products that the firm manufactured, the number of injuries related to products manufactured by the firm, the number of claims made regarding such injuries, the number of product liability lawsuits actually filed against the firm, and the number and amount of recoveries in such lawsuits.

Answer. The Federal Interagency Task Force on Product Liability found that product liability problems are one of a number of causes that have caused small businesses to go out of business. Final Report of the Task Force on Product Liability at XXXVII (May 1977). The record established by the Senate Commerce Committee in its review of product liability in the 97th and 98th Congress provide other examples. For instance, Ms. Maria Dennison of the Sporting Goods Manufacturers Association testified that only 7 of the 13 football helmet manufacturers remain in business. Hearings before the Subcommittee for Consumers on S. 2631, Statement of Maria Dennison, Serial No. 97-109 at 285 (June 30, 1982). Similar situations have occurred in the textile industry.

Question. Have product liability insurance costs increased or decreased during the last five years? Could you please provide any studies, statistics, or other information upon which you base your conclusions? If product liability insurance costs have decreased, what nexus is there between those costs and the need for S. 44?

Answer. The Insurance Services Office has indicated that actuarially computed product liability rates, called manual rates, for some product lines have stabilized or declined slightly during the years 1978, 1979, and 1980. Manual rates, predetermined on the basis of prior loss and expense experience, are used primarily for smaller risks that account for only about 10 to 20 percent of total product liability insurance volume. Most product liability risks are written on what is called an "a" rate basis, meaning they are rated primarily on the underwriter's judgment of the risk involved. Such rates are not a matter of record, but are determined on a risk-by-risk basis. Underwriters indicate that these rates have varied widely in recent years.

There has been very substantial competition among insurers in recent years spurred by the enactment in 1981 of the Risk Retention Act. That Act gives insurers an alternative to commercial product liability insurance. The financial media indicate that product liability insurance has frequently been sold at a substantial underwriting loss. The same media indicate that insurers have survived in this areas because of the boost that double digit inflation has provided to investment returns on loss reserves. A substantial amount of product liability premium is, justifiably, placed in reserves, both for pending claims and for claims incurred but not reported.

Now that inflation appears to be under control, this factor that has helped stabilize rates should disappear. Many knowledgeable people in the insurance industry have predicted a product liability rate crunch. The reality of the overwhelming legal costs and other costs associated with product liability will have to be faced directly by insurers.

Another factor to consider in response to this question is that comparing product liability premiums for the same company from year to year may be deceptive. The record before the Senate Subcommittee for Consumers is clear: a number of companies are paying premiums similar to premiums paid in the past, but they are getting less coverage. Many companies have avoided paying higher premiums for product liability insurance only by paying higher deductibles.

Question. Approximately how many product-related injuries occur each year? How many claims are filed annually regarding product-related injuries? How many product liability lawsuits are filed each year? What percentage of these cases are settled before going to trial? What percentage of these cases result in recovery by an injured plaintiff?

Answer. There is no record of how many product liability claims are filed annually. Because many large companies self-insure their product liability risk exposure, there is no single source showing how many product liability claims are filed each year against companies. Data is kept by the Federal courts, and it shows that the number of product liability suits filed in district courts has increased almost 600 percent since 1974. According to the 1977 Insurance Services Office survey of claims closed by insurers, over 90 percent of product liability claims are settled before going to trial. This same survey suggests that almost 70 percent of the claims result in recovery by an insured plaintiff.

Question. In light of the fact that the bill would require the state courts to interpret terms and apply legal standards with which they may be unfamiliar, and in light of the fact that many states appear to have well-settled liability rules which the bill may very well disrupt, how do you believe that the bill in fact will achieve its stated goal of uniformity? What effect will the initial, and perhaps lengthy period, of new interpretation and confusion following the creation of federal standards have on transaction costs? Please provide any studies or statistics which show how much in transaction costs would be saved if uniform standards were imposed?

Answer. I question the premises of this question. S. 44 in general eschews new terms. S. 44 uses legal terms with which states are familiar. Each liability term, such as "reasonable manufacturer in the same or similar circumstances," is standard hornbook law throughout the law of negligence. W. Prosser, *Handbook of the Law of Torts* § 32 (4th ed. 1971). Comparative responsibility statutes now exist in approximately 35 states. Product liability cases are either, as S. 44 sets forth, construction defect cases, duty to warn cases, design cases, or express warranty cases.

Where new terms are used, they have been carefully explained in the Report of the Senate Commerce Committee on S. 2631. S. Rep. No. 97-670 (1982). In light of the rich experience that has been developed in the hearings conducted in 1983, one can reasonably anticipate that the Senate Report on S. 44 will be even clearer.

The question assumes that "many states appear to have well-settled liability rules." This statement is contradicted by substantial portions of the record developed by the Senate Commerce Committee on both the 97th and 98th Congresses. A basic premise underlying S. 44 is that the rules are not well-settled. State courts are constantly developing new and experimental rules of law. "Well-settledness" will come about from a statute such as S. 44.

The proponents of S. 44 do not believe that S. 44 will bring about "perfect" uniformity—no statute does. Our belief is that it will bring about substantially more uniformity than we have today. For example, the Federal Rules of Evidence have been subject to different interpretations, but no one has suggested that we return to the chaotic case law evidentiary situation that existed prior to the enactment of those rules.

We cannot provide any studies that show how much will be saved in transactions costs. One could not provide that data with regard to any statute that replaces common law. S. 44 will replace chaos and confusion with a relatively clear statement of basic principles on fundamental issues in product liability law. That will save transaction costs.

Question. Are you aware of any statutes which preempt state tort law, but which do not create either concurrent federal and state jurisdiction or a federal administrative mechanism? Are you aware of any federal statutes which preempt state law, but which do not create either concurrent federal and state jurisdiction or a federal administrative mechanism?

Answer. The closest precedent for S. 44 is the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51), which was enacted in 1909. Jurisdiction over FELA actions is based on both federal and state courts. Under S. 44, jurisdiction over product liability would continue in state courts and in federal courts that have jurisdiction in suits today. As a practical matter, this is very similar to FELA.

It is instructive to note that FELA's 70-year history has been relatively stable. Precedents have been developed. Both state and federal courts have looked to the same source for guidelines—the federal statute itself and its legislative history. The same process would occur under S. 44.

Question. Take the following example. A passenger is injured in an automobile accident. It is proven that the brakes on the car were defective, and that the driver was negligent. Although these are joint causes, either would have caused the plaintiff's injuries. The plaintiff is not responsible for any degree for the accident. A jury determines that 40 percent of the responsibility of the accident should be attributed to the manufacturer of the automobile and that 60 percent of the responsibility should be attributed to the negligent driver. The jury determines that total damages are one hundred thousand dollars. The state in which the accident occurs has a stat-

ute or common law rule which grants the driver of the automobile immunity for liability for injuries suffered by his or her passenger. Under the act, it appears that the plaintiff would be able to recover forty thousand dollars from the manufacturer of the automobile. Is this correct? If so, do you think that this a fair result in light of the fact that the defect brakes alone would have caused the accident?

Answer. Similar to many very unusual hypotheticals raised under S. 44, this is one that is most unlikely to occur in today's product liability world. Guest statutes have been repealed in almost every state. No state grants drivers of automobiles total immunity from liability for injuries caused or suffered by this or her passenger. W. Prosser, J. Wade, and V. Schwartz, *Cases and Materials on Torts* at 206 (7th ed. 1982). It is very unlikely that any state would enact such a law today.

But, taking the hypothetical as a valid one, the resolution would be the same under S. 44 as it would be today. S. 44, as revised, clearly states that state laws of joint and several liability are not altered. If, under the applicable state law, the manufacturer would be a joint tortfeasor with the driver, it would be responsible for 100 percent of the damages. Many states do provide that if two or more causes of an accident are substantial and those causes bring about an indivisible injury, each cause is jointly and severally liable. On the other hand, a few states permit reduction in damages based on the negligence of a non-party (a recently enacted Indiana statute does this) and indicate that in light of comparative responsibility principles, joint and several liability would not apply where one "other cause" is immune from suit.

Question. One month after a boiler is manufactured, it is sold by a retailer and blows up one day after installation. The plaintiff proves by clear and convincing evidence through expert testimony that the accident would not have happened but for a defect which existed at the time possession of the boiler was transferred from the retailer to the consumer. However, the explosion destroys all evidence about the precise cause of the accident. It cannot be determined whether there was a defect in construction or mishandling by the retailer. There is one hundred thousand dollars in damages. Under the act, would you explain what you think the innocent victim would recover?

Answer. This question appears to contradict itself. It indicates that the accident would not have happened but for a "defect which existed at the time possession of the boiler was transferred from the retailer to the consumer." This suggests that we know what the defect in the product is. If we know what the defect in the product is, we can determine whether there was "a defect in construction or mishandling by the retailer".

Put simply, in the real world of product liability cases, we would be able to show either that the defect existed at the time of manufacture and was one for which the manufacturer would be responsible, or that the retailer mishandled the item and that it was the responsible party. Proof of the cause of an accident is required in all states today. S. 44 would not change that result.

Question. Can you point to any specific instances where product liability insurance costs, product liability judgments, or any aspects of the tort litigation system have caused a business to discontinue a product line? If so, could you provide as much information as possible about the decision to discontinue including the name of the firm, the type of product discontinued, the year the product line was discontinued, the specific reasons the firm stated at the time as the basis for the decision to discontinue, the number of injuries caused by the product line, the number of claims made as a result of such injuries, the number of product liability lawsuits brought against the firm because of such injuries, the number and size of settlements in these lawsuits, and the number and size of judgments in favor of the plaintiff in such lawsuits? Can you provide any studies or statistics which support the contention that product liability insurance costs, product liability judgments, or uncertainties in the tort litigation system have caused businesses to discontinue a product line?

Answer. The answers to the above are treated by manufacturers as privileged information. But statements by many businesses before the Senate Commerce Committee suggest that the problem is real. If businesses were to provide in detail the information requested in the question, they could subject themselves to potential product liability suits and inquiries in product liability cases about the details of the decisions to discontinue a product line.

On occasion, businesses have indicated that they have discontinued lines. For example, Secretary of Commerce Malcolm Baldrige has publicly stated that Scovill Corporation discontinued certain product lines because of potential product liability exposure. The Honorable Malcolm Baldrige, Luncheon Remarks, National Legal Center for the Public Interest, May 27, 1981.

Question. Can you provide any statistics or studies which support the contention that product liability problems have led businesses to decide not to introduce a new product line? Are there any specific instances of businesses which decided not to introduce a new product because of product liability problems? Could you provide information about such examples including the name of the firm, the type of product which was not introduced, the year the decision against development or marketing was made, and the exact nature of the product liability problems which led to the decision?

Answer. As indicated in the answer to the previous question, this information is generally privileged. The Federal Interagency Task Force on Product Liability indicated, based on privileged information that could not be released, that some businesses have declined to introduce a new product line because of product liability exposure. Final Report of the Task Force on Product Liability at VI-28 to VI-32 (May 1977). Again, numerous businesses have indicated in hearings that due to product liability exposure they have decided not to introduce new product lines. If they provided the details suggested in your question, they probably would never introduce such lines because of product liability exposure problems. Their statements would be interpreted as "admissions" and utilized against them in potential product liability cases.

Question. S. 44 says a product is unreasonably dangerous in design or formulation if a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation that the manufacturer used. Isn't innovation necessary for American industry to lead the world in the design of new products? Do you think that S. 44 might discourage the designing of new products since other manufacturers in the same circumstances might not have taken the same risk. Also, do you believe that the company which designs a new product, which its competitors chose not to design, will face an increase in product liability suits because of S. 44?

Answer. S. 44 balances the need for innovation against the need to protect persons from harms caused by products. It focuses, as the question suggests, on whether "a reasonably prudent manufacturer in the same or similar circumstances would have used the design or formulation that the manufacturer used. . . ." S. 44 will encourage new product designs; such efforts would be discouraged only where a reasonable manufacturer would not have engaged in such activity. This is precisely the behavior sound public policy should impose on manufacturers.

A company that designs a new product that its competitors chose not to design will not face an increase in product liability suits because of S. 44. To the contrary. Because Section 14 the statute prohibits evidence of new product improvements from being introduced against the same manufacturer in cases involving older products, it will encourage, or at least not discourage, new safety innovations. Presently, under the law of a few states, the very unfair and unsound result suggested in the question occurs. Under the law in these few states, a person who puts a new safety device on his product is in a worse product liability situation than one who does not make the improvement. Why? Because the person who does not use the new safety device will not be penalized in court by the introduction of evidence of such a device in cases involving his older products. Under S. 44, this unfair result is eliminated.

Question. Would the plaintiff recover under Professor Page's hypothetical concerning a line of defective pacemakers? If you recall, after a pacemaker is implanted in the plaintiff, it is discovered that 10 percent of the pacemakers in a particular batch suffer from a construction defect. It is necessary for the plaintiff to undergo surgery to replace his pacemaker. It turns out that the plaintiff's pacemaker is not one of the defective pacemakers. The plaintiff sues for the costs of the second surgery and the consequent pain and suffering. If you conclude that the plaintiff would recover under the bill, could you explain why and under which sections of the bill? Do you believe that in an action brought under the common law the plaintiff would have a better chance of recovery than under the bill? Why or why not?

Answer. This question contains another hypothetical that has never existed in the "real world". No precedent has been brought to the Committee's attention or to our attention that would suggest that the manufacturer of a non-defective pacemaker would be subject to product liability under current law. Even in those few cases that do not require the claimant to prove who caused his injury, proof that the product that injured him was defective is required. *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal.) cert. denied, 449 U.S. 912 (1980). S. 44 would not change current law—it would only provide liability to a party who was injured by a defective product.

Question. Could you provide any statistics, studies, or references to studies which indicate whether the Risk Retention Act of 1981 has led to a decrease in product liability insurance costs?

Answer. There are no statistics or studies showing that the Risk Retention Act has led to a decrease in product liability costs. Nevertheless, there is strong circumstantial evidence suggesting that the Risk Retention Act has fulfilled its goal. The trade press has indicated that product liability insurance rates have remained very competitive. All insurers are aware that the Risk Retention Act is law and that it enables businesses to form self-insurance cooperatives easily. The record developed during hearings on S. 2631 in the 97th Congress before the Senate Commerce Committee clearly shows that those who buy product liability insurance—manufacturers and product sellers—firmly believe that the Risk Retention Act has been an impetus for product liability insurance rates and premiums to remain very competitive. Further, a number of major insurers have utilized the purchasing group option of the Risk Retention Act. This option allows a group of businesses to pool together to purchase commercial insurance with the benefits of group rates. For example, the Insurance Company of North America has formed a purchasing group for the benefit of the National Association of Wholesalers (NAW). NAW members are able to obtain a better rate by purchasing on a group basis than they would have if the insurance had been purchased individually.

Question. In certain cases, will federal law apply to the conduct of some parties and state law apply to the conduct of other parties? For example, after an automobile accident, suppose it is alleged that all of the following were causes of an automobile accident: the injured driver was negligent, the brakes on the car were defectively manufactured, a pedestrian crossed in front of the car without looking, and the state had failed to repair a defective crosswalk light. Which law, state or S. 44, would apply to determine the responsibility and liability of the driver, manufacturer, pedestrian, and state respectively?

Answer. To answer this hypothetical, we have to identify the plaintiff for each of the various causes of action. The hypothetical does not state who the plaintiff is. I will assume for purposes of my answer that the injured driver and the pedestrian are the plaintiffs.

The injured driver might have a claim against the manufacturer of the car or brakes and a claim against the state. In its claim against the manufacturer, Federal product liability tort law under S. 44 would apply. The hypothetical states that the brakes were defectively manufactured. Thus, the driver would have a strict liability cause of action against the manufacturer. Because the driver himself was negligent in causing his own harm, his damages would be reduced under S. 44 to the extent that his negligence contributed to that harm. In the injured driver's claim against the state, state tort law would apply, because the claim is not a product liability action. Whether the state is immune for its negligent actions would depend on state law. State tort law would also determine whether and how to treat the driver's negligence in the action against the state.

In the pedestrian's claim against the manufacturer of the car, Federal product liability tort law would apply, because S. 44 extends to bystanders. The claim against the manufacturer of the defectively manufactured automobile would be governed by strict liability. Because the pedestrian was negligent, his damages would be reduced to the extent that the trier of fact determined he was at fault. Again, the Federal product liability tort law applies pure comparative fault standards. In the pedestrian's claim against the driver of the automobile, state tort law would apply, because such an action is not a product liability action.

Some argue that the two cases of action—one in product liability against the manufacturer and one against the state—could create some confusion. As a practical matter, the situation would be no different than the current situation. In fact, in many states there would be less confusion than there is today. Today, separate causes of action could be brought in product liability against the manufacturer and, under applicable tort law principles, against the state or the negligent driver. In many states, product liability principles differ from tort law principles that apply in other causes of action. For example, in a number of states today, the manufacturer could be subject to strict liability and the other parties would be liable only for their negligence. The Federal bill would not change this result. Similarly, the conduct of the plaintiffs might be judged under a different standard with respect to the manufacturer as contrasted with other parties. About 34 states have so-called "comparative negligence" statutes, but a number of these statutes are interpreted as inapplicable in product liability actions. The Federal product liability law will harmonize results in many states in dealing with the conduct of the plaintiff—comparative fault principles will apply both in product liability actions and in other tort actions.

Question. If you consider national uniformity the principal reason why a federal cause of action for products liability is desirable, then would you support federal en-

actment of Restatement (Second) of Torts § 402A, which is already law in about two-thirds of the states? Why or why not?

Answer. I disagree with the premise of this question that the Restatement (Second) of Torts § 402A "is already the law in about two-thirds of the states." While many states have suggested that they follow § 402A, there are decidedly different interpretations of that section of the Restatement. For example, some states require showing that the product is "unreasonably dangerous." Other states have rejected that requirement. The Restatement refers to a product that "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. . . ." Nevertheless, in a number of states that purport to apply the Restatement, liability is imposed on a manufacturer even though its product has been substantially altered. Perhaps most important, use of the Restatement in failure to warn cases or cases alleging failure to design a product properly are all over the lot. There is confusion on these fundamental issues.

It is unfair to fault the authors of the Restatement for this confusion. At the time § 402A was prepared, the authors focused solely on construction defects or mismanufactured products. This is proven by the fact that all of the cases cited in support of § 402A (appearing in the Appendix to the Restatement) were construction defect cases. Moreover, another section of Restatement of Torts (Second), § 398, deals with design liability.

At the time the Restatement was drafted, the functional distinctions among construction defects, design defects, failure to warn, and failure to follow an express warranty were not well-defined. Because the functional differences in these types of product liability cases were not recognized, the Restatement has created more confusion than uniformity. Its enactment on a Federal level would not create the uniformity that is necessary.

Another reason why the Restatement should not be enacted at the Federal level is that the authors of the Restatement were confined to case law that was in existence in 1964. The American Law Institute's rules require that, in drafting any restatement of law, the authors must look to and use existing case law for support. Thus, the term "restatement" of the law. There is no latitude to be creative as there is when drafting codes or statutes.

Because they were restricted to existing case law, the authors of the Restatement were unable to develop or utilize devices that could substantially cut transaction or lawyer costs in the area of product liability. For example, they could not provide a provision, such as one that exists both in the Uniform Product Liability Act and in S. 44, holding product sellers liable for their own negligence unless the manufacturer is out of business or not reachable by process. The authors were confined to imposing strict liability broadly on product sellers in all cases or imposing liability only when they were negligent with no exceptions when the manufacturer was out of business. There was simply no "case law" providing the substantial transaction cost-cutting option that appears in the Uniform Product Liability Act and in S. 44.

These are some of the primary reasons why it would be inappropriate to enact the Restatement (Second) of Torts § 402A. It has not and would not achieve uniformity nor would it result in savings in transaction costs—a primary goal of S. 44.

Question. S. 44 excludes recovery for mental distress in the absence of physical harm. If a plaintiff can prove that he suffered severe mental disturbance as the result of witnessing a family member being killed by a defective product, do you think he should recover? Why or why not? Would your answer be the same if he proved that the defect had resulted from the defendant's negligence, or from the defendant's reckless disregard for the safety of persons who might be injured by the products? Why or why not?

Answer. S. 44 follows majority case law and does not permit a cause of action for mental disturbance caused to a bystander, such as a person who witnessed another person being injured by a defective product. The overwhelming majority of cases have rejected such a cause of action for several reasons. First, most courts appreciate the fact that there are limited assets to be distributed for harms. In light of that fact, it seems preferable to compensate persons with true physical injury or persons whose property is damaged rather than to enter into speculative realms of compensation. In that regard, the Supreme Court of North Dakota has observed:

"There will be losses, and our present system of insurance attempts to compensate for them, and, of course, to spread the costs of compensation over those who do not, as well as those who do, cause such losses. But could that system—imperfect at best—adequately and fairly absorb the far-reaching extension of liability that would follow from judicial abrogation of the rule now before us? And what of the many other activities of every day life that are either uninsurable or customarily uninsured, yet may well give rise to the type of 'spectator injury' here alleged?"

Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972). The court then showed that compensation for such injuries could easily extend to persons who might be mistaken in believing that the third person was in danger. And what is the magic in the plaintiff's actually being present? Is the shock any less real if a person does not know of the harm to another until after the injury occurs? On the other hand, is it any less real if a person was physically present at the scene of the harm but was unaware of the danger or injury until after it had occurred?

For these reasons the cause of action has been overwhelmingly rejected by the majority of courts. See 29 A.L.R. 3d 1347 (1979).

Question. S. 44 defines "product seller" as a person who sells or otherwise distributes a product "in the course of business conducted for that purpose." Would the quoted phrase absolve sellers who regularly distribute a product where distribution of the product is only tangential to the seller's main business? For instance, would a bank be liable for a product it regularly gave away as an inducement to open new accounts? Do you think it should be (at least in the same circumstances as other sellers under S. 44)? Why or why not?

Answer. This question, focusing on the definition of a product seller as a person who sells or otherwise distributes a product "in the course of business conducted for that purpose," is similar to language that has operated, without difficulty, under Section 402A of the Restatement (Second) of Torts. That Section states that the seller is a person "engaged in the business of selling such a product. . . ." The purpose in S. 44 and Section 402A is to avoid including the occasional private seller. See also § 102(A), Uniform Product Liability Act.

It is my judgment that if, in the course of his business, a person regularly distributes a product, he would fall under the definition of a product seller. The key point is whether that distribution was part of the business. Thus, if a product seller engages in the regular distribution of a product that regular distribution would bring him under the definition of product seller in S. 44, even though its principal business was in another line. It might be appropriate to clarify the words "conducted for that purpose."

Question. S. 44 adopts a negligence standard in design defect cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. Negligence and strict liability standards can be meaningfully differentiated. Prior to the adoption of Section 402A of the Restatement (Second) of Torts, courts clearly understood the distinction. Unfortunately, Section 402A created confusion in the law, particularly where courts attempted to apply its strict liability standard in design defect cases. It is important to note that the standard for design liability is discussed and set forth in Section 398 of the Restatement (Second) of Torts. That Section provides that manufacturers are liable for "failure to exercise reasonable care in the adoption of a safe plan or design. . . ."

If true strict liability were applied in the design area, manufacturers would be subject to liability even though they exercised all reasonable care in designing a product. How can a trier of fact make a judgment about a design once we leave that standard? Although some courts have attempted to develop some type of strict liability "test" that would guide the jury, these guidelines have been nothing more than a morass of confusion. Most of the time, the tests incorporate elements of negligence. For example, a number of courts suggest that the product's risks and probability of harm should be balanced against the burden on the manufacturer to avoid that risk and whether any change in the product might compromise the utility of the product. In applying such a balancing test, most courts direct the jury to focus on risk assessment at the time the product was manufactured. In effect, this test, purportedly a strict liability test, brings back the concept of the "reasonable person in the same or similar circumstances" without ever stating it. See Twerski, *National Product Liability Legislation*, 18 Idaho L. Rev. 422-23 (1982) ("There is considerable dicta . . . that strict liability will be applied, but when push has come to shove, most courts have backed off the extreme proposition that strict liability should apply in design and failure to warn cases."). During hearings on both S. 2631 and S. 44 witnesses, including those from the consumer community, recognized that the overwhelming majority of courts in the design area do, in fact, utilize a negligence test. Statement of David I. Greenberg, Consumer Federation of America, Hearings Before the Senate Subcommittee for Consumers on S. 2631, Serial No. 97-109 at 269 (1982).

It is appropriate to apply a negligence standard in design defect cases, because those cases focus on conduct of a manufacturer. In general, when tort law focuses on conduct of an individual, whether an engineer, an architect, a physician, or a lawyer, the standard is one of a reasonable person in the circumstances. Under this standard, we make a moral judgment about whether the individual's conduct was

right or wrong, reasonable or unreasonable. This is an appropriate judgment to make in tort law. If we leave that negligence standard and move to strict liability, we suggest that the individual's conduct and moral judgment about that conduct are irrelevant. If that is the path we want to follow, we should focus on a compensation system with very limited damages, such as workers' compensation. It is totally and completely inappropriate to utilize strict liability abstractions in judging conduct in tort law.

Question. S. 44 provides that a manufacturer has a duty to provide "necessary" warnings (warnings at the time of manufacture) if, among other things, such warnings would have prevented a reasonably prudent product user from being harmed. This condition need not be met, however, for a manufacturer to have an obligation to provide post-manufacture warnings. Do you think this distinction is justified? Why or why not?

Answer. I do not think that the distinction is justified. The requirement that warnings would have prevented a reasonably prudent product user from being harmed is appropriate in both the duty to provide necessary warnings section and the post-manufacturer duty to warn section.

In that regard, the requirement that warnings would have prevented a reasonably prudent product user from being harmed, either because the user would have declined to use the product or because the product would have been used in a manner so as to have avoided the harm, is fundamental to tort law. It has been accepted by courts that have adopted even the broadest plaintiff-oriented concepts of product liability law. See *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex 1972); W. Prosser, *Handbook of the Law of Torts* at 236 (4th ed. 1971). I would suggest that the section on post-manufacture warnings cross-reference the requirement set forth in Section 6(b)(2) of S. 44.

Question. S. 44 adopts a negligence standard in failure to warn cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. A negligence standard can be clearly differentiated from a strict liability standard in duty to warn cases. A negligence standard treats product manufacturers like any other person in our society is treated by tort law. It makes a judgment about the manufacturer's conduct at the time he was capable of acting to change that conduct, i.e., at the time the product was manufactured or when new information comes to his attention after the product was manufactured. It does not use hindsight.

In the area of warnings, hindsight is the equivalent of strict liability. As a matter of common sense, after an accident has happened one can almost always come up with some warning that might have prevented the accident.

The overwhelming majority of courts have appreciated this and have applied negligence principles in the area of duty to warn. See *E. G. Smith v. E. R. Squibb & Sons*, 405 Mich. 79, 273 N.W.2d 476 (1979); *Woodhill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); *Robbins v. Farmers Union Rain Terminal Association*, 552 F.2d 778 (8th Cir. 1977) (collecting cases).

The same conclusion was reached by the Federal Interagency Task Force on Product Liability. See Final Report of the Task Force on Product Liability at II-15 (May 1977).

Question. S. 44 makes a plaintiff's misuse of a product a defense, even where such misuse was foreseeable to the manufacturer and had not been warned against. Do you think this is desirable? Why or why not?

Answer. As the Department of Commerce Task Force on Product Liability noted: "Almost any kind of misconduct with regard to products can be 'foreseeable' especially if the trier of fact is permitted to use hindsight, e.g., that a soda bottle will be used as a hammer, that someone will attempt to drive a land vehicle on water, that perfume will be poured on a candle in order to scent it. * * *"—44 Fed. Reg. at 62719 (1979).

For that reason, the Task Force rejected use of the "foreseeability" concept in the Uniform Product Liability Act. Further, the cost of liability imposed in such cases is passed along to consumers. Should consumers pay the cost of a tort judgment given to those harmed could be deemed "foreseeable," yet liability is, according to common sense, undesirable. At present, product liability costs included in the price of a ladder are at 18 percent. Should it be higher?

On the other hand, there are certain misuses of products for which a manufacturer should be responsible. As the Task Force noted, it is appropriate and fair to all concerned to place responsibility on the manufacturer for reasonably anticipated

conduct. The Task Force indicated that "anticipated" conduct includes occurrences which are expected, ordinary, usual, and familiar.

The Task Force's conclusion was that:

"[R]eliance on the concept of 'reasonably anticipated conduct' places incentives for loss prevention on both product sellers and product users. It also helps to ensure that the price of products is not affected by the liability insurance costs that would spring from providing coverage for abnormal product use."—44 Fed. Reg. at 62720 (1979).

Question. S. 44 requires plaintiffs who bring design defect cases to prove that "a means to eliminate the danger that caused the harm was within practical technological feasibility." It also allows plaintiffs to prove that "an alternative design" was available. What, if any, is the difference between these phrases.

Answer. The first phrase, requiring plaintiffs to prove that "a means to eliminate the danger that caused the harm was within practical technological feasibility," is, as was noted in the commentary supporting the Uniform Product Liability Act, "in accord with the great majority of case law. . . ." See 44 Fed. Reg. at 62730 (1979). The Supreme Court of Oregon recently stated that the "plaintiff's prima facie case of a defect must show more than the technical possibility of a safe design. . . ." *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, 1326 (1978). Feasibility includes economic considerations, such as the ability of a product seller to price a product so that it is competitive, but it excludes financial considerations peculiar to a particular product seller, such as its cash flow at the relevant time.

A plaintiff may go beyond proof of his prima facie case by showing an alternative design. That showing focuses not only on a means to eliminate the danger, but also on the viability and practicality of the alternative design. Both from a practical point of view and a legal point of view, it is highly desirable to set forth when proof of alternative design may be used to support the claimant's case. Under S. 44, the plaintiff must show that the alternative design would not have created greater hazards than those it would have eliminated. Also, the alternative must be one that would have been desirable to the person who used or consumed the product. The alternative design must employ technology that was recognized and was feasible.

This provision of S. 44 prevents introduction of evidence of hypothetical alternative designs. The claimant should not be permitted to base his case on evidence of an alternative design conjured up by so-called experts when that alternative design could never have been put into practical production. Also, the provision focusing on which, if any, alternative designs the trier of fact can view and examine, will help create uniformity in an area where it is needed.

Question. S. 44 prohibits a breach of implied warranty actions. Do you think this will have any effect on injured parties (beyond the effect that preemption of common law tort actions will have)?

Answer. The decision to eliminate from S. 44 actions based on the commercial law theory of implied warranty recognizes that which was recognized long ago by Justice Traynor in *Greenman v. Yuba Power Products, Inc.* He said:

"[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturers' liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed."—59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897.

S. 44 eliminates the confusion of basing a single claim on multiple causes of action. Following the Uniform Product Liability Act, it replaces this confusion with a functional approach to product liability law. S. 44 specifies a single cause of action for product liability claims. It applies different standards of liability depending on the functional type of defect that caused the harm. A strict liability standard applies to cases involving a construction defect or a failure to conform to an express warranty. A "reasonable prudence" negligence-based standard applies to design or formulation and warning defect cases.

The question suggests that by merging all theories of recovery into one product liability cause of action and eliminating actions currently based on implied warranty, the bill will deprive a claimant of a valuable right to sue in strict liability under implied warranty for product related harms arising from design or formulation in warning cases. This concern is not well-founded for the following reasons.

First, the standards of liability specified by S. 44 for different types of product-related suits are consistent with the standards applied under implied warranty theories. Therefore, the standards provided by the bill will lead to the same result currently achieved under existing theories of law.

The overwhelming number of cases that are brought under an implied warranty theory are cases involving a construction defect or breach of express warranty, such

as claims involving deleterious matter in food. S. 44, as indicated, provides a strict liability standard in construction defect or express warranty cases. Thus, S. 44 will lead to the same result as that under current implied warranty theories.

With respect to design or formulation defect cases and to warning cases, courts have used a "reasonable standard" approach where the case is based on breach of implied warranty. As Dean Prosser observed:

"When the factual issue is not whether the product [has a construction defect], but whether the manufacturer has provided adequate warnings, the existence of a product defect in a breach of duty is determined by the same standard—reasonable care under the circumstances. . . . Consequently, when liability turns on the adequacy of a warning, the issue is one of reasonable care, regardless of whether the theory pled is negligence, implied warranty, or strict liability in tort."—W. Prosser, *Handbook of the Law of Torts* at 645 (4th ed. 1971). (Emphasis added.) See *Donigi v. American Cynamid Co.*, 57 App. Div. 2d 670, 394 N.Y.S.2d 422 (1977), *aff'd*, 43 N.Y.2d 935, 403 N.Y.S.2d 894, 374 N.E.2d 1245 (1978) ("Under implied warranty or negligence, the issue . . . is whether it knew or should have known about the drug's effects.").

S. 44 not only retains the existing rights of claimants under implied warranty, it also eliminates many of the commercial law issues and defenses that may impede a claimant's recovery in a product liability suit brought under a breach of implied warranty theory. For example, by eliminating contract theories from product liability suits, S. 44 eliminates the frequently harsh effects of rules incident to implied warranty that are enforced in some states, such as privity, notice, disclaimer, and time limitations on remedies. See e.g., *Ford Motor Co. v. Moulton*, 511 S.W.2d 690 (Tenn. 1974).

Question. S. 44 absolves from liability nonmanufacturers who are not negligent or in breach of an express warranty, except in cases in which the manufacturer is not subject to service of process under the laws of the state in which the action is brought or the court determines that the claimant would be unable to enforce a judgment against the manufacturer. Do you think this is desirable? Why or why not? Do you think nonmanufacturers should be liable if the court determines that the claimant would be able to enforce a judgment against the manufacturer, but it turns out that, after a reasonable period of time, he cannot? Why or why not?

Answer. S. 44 adheres to the principle that nonmanufacturer product sellers should be liable only for harms caused by their own fault, unless the responsible product manufacturer is out-of-business or cannot be reached by judicial process. This principle stems from the strong recommendation of the Department of Commerce Task Force on Product Liability that such an approach will help reduce "the problem of excessive product liability costs for parties other than the manufacturers in the distribution chain. . . ." See 44 Fed. Reg. at 62726 (1979). In proposing the approach adhered to in S. 44, the Task Force noted that the approach "does not compromise incentives for loss prevention . . . and . . . leaves the claimant with a viable defendant whenever a defective product has caused harm. . . ." *Id.*

Good data shows that nonmanufacturer product sellers account for only 4.6 percent of the total amount of product liability payments. See Insurance Services Office Closed Claim Survey, Report 3 at 35 (1977). Case law generally allows nonmanufacturer product sellers to shift the costs of a product liability judgment onto the product manufacturer who actually caused the harm through an indemnity or contribution suit.

In spite of their very small role in product liability cases, wholesalers, retailers, and distributors are frequently brought into product liability suits. As a result they have substantial costs relating to insurance premiums and defense costs. These costs are added to the price of products and are a waste of legal resources. See *Pender v. Skillcraft Industries, Inc.*, 358 So. 2d 45 (Fla. App. 1978).

If S. 44 strictly adhered to the tenet that responsibility for harm should be placed on the party that actually caused the harm, it would only hold product retailers, wholesalers, and distributors liable when they themselves are at fault. This is the law in some states. S. 44, however, rejects this rule. In an attempt to meet consumer concerns, S. 44 imposes vicarious liability on product sellers when the truly responsible manufacturer is out-of-business or not reachable by service of process. If a court determines that a claimant would be able to enforce a judgment against the manufacturer, but it turns out that he cannot, the plaintiff can make a showing that is required in Section 8 of S. 44.

Question. What is the effect of postponing several liability of joint tortfeasors by making each defendant liable only for his share of the damage award unless the court determines that part of the damage award is not collectible from a particular defendant? Do you think this is desirable? Why or why not?

Answer. This provision in S. 44 has been eliminated in staff revisions that were submitted to the Administration. Under S. 44 as revised, state rules of joint and several liability are unaffected. A claimant may obtain a judgment against two defendants and, if those defendants are joint tortfeasors, state law may allow the claimant to collect the entire judgment from one of the defendants. Under the Act as previously drafted, the claimant would collect a judgment from each defendant proportionate to that defendant's share of responsibility. If unable to collect from one defendant, the claimant could return to court to have that joint tortfeasor's share of the damages reallocated. That approach would have reduced transaction costs by eliminating the need for the joint tortfeasors to bring contribution and indemnity claims against each other. Consumer groups voiced concerns that it was inappropriate to alter state rules of joint and several liability even through the procedural mechanism in the prior version of S. 44 that would have reduced transaction costs.

Question. S. 44 provides that if part of the award is not collectible, such part shall be reallocated among the other parties, including the plaintiff, in proportion to their responsibility. This means that the plaintiff may collect less than the amount proportion to the responsibility attributable to all defendants. Do you think this is desirable? Why or why not?

Answer. This portion of S. 44 provides that where the court determines that one or more of the joint tortfeasors is judgment-proof, the uncollectible judgment will be reallocated to each remaining joint tortfeasor and to the claimant in proportion to their respective percentages of fault. The provision conforms to the Uniform Comparative Fault Act. The Reporter of the Uniform Act, Professor John W. Wade of Vanderbilt Law School, noted that the reallocation provision was a compromise. Some advocated that a pure comparative fault system, such as that in the Uniform Act and S. 44, should totally eliminate joint and several liability, because the concepts of pure comparative responsibility and joint and several liability are incompatible. Others argued that pure comparative responsibility was totally irrelevant to the law of joint and several liability.

The Uniform Act takes a middle ground, as does S. 44. Dean Wade explained:

"If an award against one defendant was uncollectible at common law the plaintiff could collect against any of the other defendants who are jointly and severally liable. This seems unfair when the plaintiff is himself at fault. It also seems unfair to adopt the position of some statutes and throw the total loss on the plaintiff by abolishing the joint and several liability. This Section therefore provides that the apportionment for the uncollectible amount will be made among all of the other parties, including the claimant, according to their respective percentages of fault in the suit." —J. Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 *Jour. Law Reform* 231-32 (1977).

It should be noted that prior to the introduction of pure and comparative responsibility, a claimant would recover no damages from any defendant where the claimant were at fault, or under modified comparative responsibility states, the claimant would recover no damages where it was 50 percent or more at fault.

Question. S. 44, unlike the law in many states, would reduce a plaintiff's award if the plaintiff should have known of the defective condition and if the failure to know contributed toward the plaintiff's injury. Do you think this is fair? Why or why not?

Answer. This question does not follow the material language S. 44. S. 44 does not reduce the plaintiff's award if the plaintiff should have known of the defective condition. It does reduce and award when the defective condition "would have been apparent, without inspection, to an ordinary reasonably prudent person" (Section 10(c)(2)(A)) or when the claimant knew and voluntarily assumed the risk of harm from a defective product (Section 10(c)(1)(B)). Neither provision allows a reduction for defects about which the claimant should have known.

The first provision focuses on defects that are obvious, manifest, and clear without any inspection at all. It does not require the product user or consumer to inspect for a product defect nor does it place a burden on the plaintiff to discover defects. This is the majority rule.

The second, providing a reduction of damages to the extent the claimant's assumption of the risk caused the harm, departs from majority law. The Restatement (Second) of Torts § 402A, comment n, and the law of most states, would bar recovery when the plaintiff has voluntarily assumed the risk of harm from a product. See Final Report of the Interagency Task Force at VII-51 (May 1977).

An individual who fails to discover an "apparent" or "obvious" defect could, theoretically, be allowed full recovery in many states. However, if that person knew about the defect and proceeded anyway, the individual may have assumed the risk of harm and most states would be totally bar the claim. This approach has led to considerable litigation and expense over the issue of whether a claimant knew or

did not know about a particular manifest effect. See Final Report of the Interagency Task Force at VII-53 (May 1977). S. 44 eliminates this distinction between an obvious defect and a voluntarily assumed risk of harm. This is in accord with the Task Force's recommendation that both types of conduct, which are almost identical in their moral and practical meaning, should be treated alike. See 44 Fed. Reg. at 62737 (1979).

Question. In cases in which a defective product and a negligence employer had both contributed to an employee's injury, and the employer and employee were under a workers' compensation statute, S. 44 would reduce the manufacturer's liability by the amount of the workers' compensation benefits if such benefits were greater than the share of the damages for which parties other than the manufacturer were responsible. Do you think this is desirable? Why or why not?

Answer. This section of the bill has been modified in the staff draft circulated to the Administration. The product liability damages of a worker stemming from a workplace injury are no longer reduced by an amount proportionate to the fault of the employer. S. 44 now simply reduces damages in the workplace accident by an amount equal to workers' compensation benefits paid to the claimant (the amount of the subrogation lien). The defendant pays his percentage of the remaining amount. Therefore, S. 44 eliminates the subrogation lien, which did not benefit the worker in any way, but rather flowed to his employer or his employer's insurance carrier. The elimination of the subrogation lien will substantially reduce transaction costs, because there will be no more disputes between the manufacturer and employer. At the same time, it will not raise the cost of workers' compensation for employers. Most insurers do not calculate in the cost of recovery of subrogation liens in setting workers' compensation rates and premiums.

From the point of view of the employer, the loss of the subrogation lien is balanced by the guarantee of immunity from tort liability. S. 44 prohibits manufacturers from bringing a contribution or indemnity claim against employers. Some states allow such claims with the result that the cost of a tort suit is borne by the employer. The employer ends up paying this cost even though he is supposed to be free of tort liability under the immunity provisions of state worker's compensation laws.

The approach taken in Section 11 of S. 44 is highly desirable. It places incentives for risk prevention on the party or parties who best can accomplish that task and reduces transaction costs. It accomplishes these goals without any curtailment of a claimant's rights.

Question. Do you think a period of limitations from the date of first sale is desirable? Why or why not? Assuming you think such a period of limitations is desirable, do you support the 25 year period in S. 44, applicable only to capital goods and only in design defect and failure to warn cases? Would you shorten it, lengthen it, or extend it to manufacturing defect or breach of express warranty cases? Why or why not?

Answer. I assume that this question refers to a statute of repose, as there is no statute of limitations in S. 44. The statute of repose in the bill begins the relevant 25-year period at "the date of delivery of the product to the first purchaser . . ." See Section 12(a)(1). As compared with other dates, i.e., date of manufacture, production, or design, the date of delivery is the time closest to when the product is actually obtained by the purchaser. Further, it is a relatively identifiable period. I think S. 44 is correct in choosing this date.

With regard to duration, I believe that the 25-year statute of repose in S. 44 is too long. The 25-year statute reaches back to the time when Sputnik was launched by the Soviet Union. Most statutes of repose in the United States are between 10 and 12 years long. The 25-year time was chosen with a view to provide the utmost protection to persons who use products. According to Insurance Services Office, almost all product liability cases will occur within that period of time. See Insurance Services Office Closed Claims Survey at 107 (1977).

The rationale for the statute is threefold. First, a product, used safely for over 25 years, in all likelihood, was not defective at the time of delivery. Second, after 25 years the fact about the product and its design and manufacture are extremely difficult to develop, because the passage of time creates obstacles to securing proof. The Department of Commerce Task Force noted that "although the burden of proof on the issue of defectiveness remains on the claimant . . . , a jury, as a practical matter, may demand an explanation from a product seller when the claimant has suffered a severe injury . . ." See 44 Fed. Reg. at 62734 (1979). Third, as a matter of sound public policy, persons at some point in time ought to be able to plan their affairs with reasonable certainty.

The relatively few cases that may be brought for products over 25 years old are usually nuisance cases. A claimant's attorney realizes that the manufacturer has

great fear of such cases. It no longer has control over these older products and, if deemed liable, it has to worry about all products in the field that are over two decades old. For that reason, these cases are sometimes settled even though there is no factual basis for liability.

I do not think the statute needs to be extended to manufacturing defect cases. No cases involving a manufacturing defect in a product over 25 years old have come to my attention. Manufacturing defects almost always manifest themselves relatively soon. Similarly, I would not extend the statute to express warranty cases. Where an express warranty guarantees the safety of the product for a specified or unlimited period of time over 25 years, that warranty should apply.

Question. If S. 44 is enacted, do you think many injured parties who could otherwise prove their cases would be barred by the 25-year limitation? Do you think S. 44, as written, would leave the states free to enforce a period of limitations beginning on the date of first sale in manufacturing defect or breach of express warranty cases? Should S. 44 allow states to do this? Why or why not?

Answer. As indicated in my answer to the question above, practically no suits would be barred by the 25-year statute of repose in S. 44. Existing ISO data make this crystal clear. See Insurance Services Office Closed Claims Survey at 107 (1977). The main concern is about nuisance cases. In such cases, the remote possibility of a verdict forces a manufacturer to settle rather than risk a judgment in cases involving very old products. Again, these cases almost certainly do not involve a product defect that existed when the product was first delivered. These cases generally involve products that are worn out, altered, or misused, although sometimes such facts causing the harm are difficult to prove.

S. 44, as written, fully covers the topic of statute of repose for capital goods. A state would not be free to enforce its own statute of repose dealing with manufacturing or express warranty defects in a capital good.

Question. Under S. 44, plaintiffs would have to prove by "clear and convincing" evidence their entitlement to punitive damages, and the amount of such damages would be fixed by the Court. Do you think these changes from present practice are desirable? Why or why not? Why should punitive damages not be determined by the jury?

Answer. Many have called for the abolition of punitive damages in product liability cases, because they serve no tort law purpose. They are not directed at compensating a person for losses caused by the fault of another. See The Defense Research Institute, *The Case Against Punitive Damages* (Monograph 1969). Today, four states do not permit punitive damages in product liability actions. See Ghiardi and Kircher, *Punitive Damages* (Callaghan & Co. 1981).

Because punitive damages are generally recognized, it has been persuasively argued that the defendant should have the same constitutional protections that he would have under criminal law. One of those protections in criminal law is the right to have a case proven "beyond a reasonable doubt."

S. 44 does not go that far. Although punitive damages are non-compensatory, S. 44 assumes that the punishment involved is more in the nature of a civil fine than a criminal sanction. The damages are, in effect, quasi-criminal. Therefore, S. 44 follows the Uniform Product Liability Act and selects a standard of proof between the civil standard of "preponderance of the evidence" and the "beyond a reasonable doubt standard" in criminal cases. The bill proposes a "clear and convincing" standard. A jury should be fully and completely convinced of the defendant's reckless misbehavior before it subjects a defendant to punitive damages. The clear and convincing standard will focus the jury on this point and will do so better than simple preponderance standard.

With regard to the amount of punitive damages, S. 44 draws upon a concept that appears in a Connecticut statute. The court, rather than the jury, determines the amount of punitive damages. See Conn. Stat. Ann. Sec. 549.21 (Supp. 1978). This approach is in accord with the longstanding tradition of the criminal law under which the jury determines the guilt or innocence of the accused and the judge imposes the penalty or sentence. This approach represents sound public policy. Manufacturers may make and sell hundreds or thousands of a single product line. They are potentially subject to repeated imposition of punitive damages for harm caused by that product line. See Owen, *Punitive Damages in Product Liability Litigation*, 74 Mich. L. Rev. 1257, 1299-319 (1976). The net result may be over-punishment. A manufacturer in the multiple exposure cases can be subject to damages far beyond their guilt.

Further, where the amount of punitive damages is left to the jury, rather than the court, a manufacturer's assets can be exhausted by the punitive damage awards before people seriously injured are able to recover compensatory damages from the

manufacturer. A court can carefully examine this factor in determining how much in punitive damages should be awarded.

A jury cannot appropriately review prior awards of punitive damages. The principal function of a jury is to determine whether or not the defendant is liable. If a jury hears evidence that the defendant has already paid punitive damages in other cases, it could be prejudiced in its decision about liability in the case before it. Also, where the jury determines the amount of punitive damages, it hears highly prejudicial evidence on the issue of how much damages should be awarded. An example of such evidence, as set forth in S. 44, is the extent of profit made by the company.

In sum, this section of S. 44 represents carefully balanced choices of public policy regarding the topic of punitive damages.

Question. Do you think S. 44 should address the market share theory of liability adopted in *Sindell v. Abbott Laboratories*, 607 P.2d 924, cert. den., 440 U.S. 912 (1980) (This case held defendants liable in proportion to their share of the market of the defective product, even though the plaintiffs has failed to prove which particular defendant had manufactured the product that caused their injuries.) Why or why not? If so, what position should it take? Why?

Answer. Although the *Sindell* case caused a tremendous stir in the field of product liability when it was first announced by the Supreme Court of California in 1980, it has not been followed by other state courts. In point of fact, the principal decisions that appear to follow *Sindell* are Federal court cases that have only "guessed" about the law of the state in which the Federal court was sitting. Because there is no sharp division or confusion in the law regarding the issue in *Sindell*, the issue may not be important enough to address in a Federal statute at this time. By way of contrast, the other issues addressed in S. 44 have a very long history of consideration by the variety of courts in the United States. The various and conflicting decisions have been carefully considered in choosing a rule of law.

If the *Sindell* issue were to be addressed, Staff Drafts Nos. 1 and 2 suggest the appropriate resolution. Tort law should not permit a recovery where a plaintiff cannot identify who manufactured the product that injured him or her.

Question. It has been said that the increased number of recoveries brought about by the advent of strict liability is a reason that products manufacturers and their insurers want federal action. Would you comment?

Answer. The Product Liability Alliance does not argue that the rise in the number of recoveries due to the advent of so-called strict liability is a reason for enacting a Federal product liability law. Rather, the argument for enacting a Federal product liability law is based on confusion in the law. For example, courts do not agree on what strict liability is. On this and a wide variety of other fundamental issues of product liability law, there is no consensus. As a result, an excessive amount of money is going to lawyers rather than claimants. Product liability has become totally entwined with interstate commerce. Uniformity, predictability, and stability in the law are essential. The purpose of a Federal law is not to reduce the number of recoveries where persons have been harmed by mismanufactured products or harmed by products where the manufacture has been at fault.

Question. The Senate report S. 2631 contends that strict liability "is not a meaningful standard in design or formulation defect cases." Would the law in the majority of states agree with the Senate report?

Answer. As the record the Senate Commerce Committee on S. 2631 demonstrates, both consumer and business organizations agree that true strict liability is not the law in a majority of states regarding the standard in design or formulation in defect cases. The Federal Interagency Task Force on Product Liability developed a seven-volume study of the law in this area. The Task Force noted that "because most courts have refused to impute knowledge of unknowable risks to manufacturers, negligence and 'strict liability' are functional equivalents in design defect cases in most states." See Final Report of the Task Force at II-9 (1977). The Task Force further noted that "the distinction between 'strict liability' and 'negligence' in product liability is often one more of language, than actual results."

While some courts have attempted to utilize a so-called "risk utility" analysis in deciding such cases, the test that derived from negligence law. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947) (Judge Learned Hand, applying negligence principles and utilizing risk utility analysis in an admiralty case). As Professor Wade as noted, juries are not equipped to fathom such abstract concepts. Juries are equipped to focus on the conduct of a defendant and to decide whether it has been reasonably prudent. They do this in all other, analogous, tort actions. The reasonably prudent person is a frame of reference that is readily understood by juries evaluating fault.

Question. Under Section 5(b) of S. 44, a product would not be unreasonably dangerous in design unless a means to eliminate the danger was within "practical technological feasibility." Is this standard consistent with the "state of the art" defense practiced in many states?

Answer. The "practical technological feasibility" standard is consistent with state of the art defense in many states. The Department of Commerce Task Force noted that "the test is in accord with a great majority of case law . . ." See 44 Fed. Reg. at 62730 (1979). But the standard in S. 44 does not permit manufacturers to hide behind a custom practices by the industry. In this respect, S. 44 is more protective of the consumer than the law of those states that equate "start of the art" with custom of an industry. Under S. 44, each member of an industry must do that which was within "practical technological feasibility", regardless of what the industry practice or custom may be.

Question. Section 5(c) of S. 44 provides that a product is not unreasonably dangerous in design if its dangerous aspect could not "have been eliminated without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it." There is not mention in comment "k" to Restatement Section 402A that a serious impairment of economic desirability is sufficient to allow a court to deem a product incapable of having been made safer. Would the explicit inclusion of this factor in S. 44 allow manufacturers to avoid liability merely on the ground that using a safer design for the product would have resulted in a substantially higher selling price?

Answer. S. 44 will not automatically allow manufacturers to avoid liability on the ground that using a safer design for the product would have resulted in a substantially higher price. However, it does indicate that serious impairment of economic desirability may be utilized to make a finding that a product is not unreasonably dangerous. This is in accord with many cases today. For example, in a case involving a Volkswagen minibus, a Federal court decided that the economic desirability of the product is a sufficient factor to allow the minibus to be produced in our society. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1975). Persons who purchased the minibus could appreciate the limitations it had on safety as compared with or contrasted with vehicles that were larger and heavier. Also, today, in states that use so-called "risk benefit" analysis, judges and juries weigh product risks against their desirability as well as economic costs that would be expended in making the product safer. A product liability law that did not consider impairment of the desirability of the product, economic or otherwise, would fail to recognize the basic practicalities of the existing marketplace.

Question. In a number states, involuntary assumption of the risk has been eliminated from the law as a defense. Why should assumption of the risk be included in S. 44 as a defense?

Answer. Under the Restatement of Torts (Second) 402A comment n, voluntary assumption of risk is an absolute defense in product liability cases. This has been followed in many states in the area of product liability. See Final Report of the Task Force at II-20 (May 1977). The question discusses involuntary assumption of risk. This is not a defense in most states, and it is not a defense under S. 44. Under S. 44, assumption of risk must involve both voluntary conduct and knowing conduct. The claimant must know "about the product's defective condition and voluntarily use the product or voluntarily assume the risk of harm from the product. . . ." See Section 10(c)(2)(B). If that is proved, S. 44 reduces damages rather than totally barring the claim. Thus, the claimant would be in a better position than he is today under the law in many states. See, i.e., *Barefield v. LaSalle Coca Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786 (1963) (claim barred where claimant drank beverage he knew to be full of glass).

Question. Explain what is meant by proximate cause in S. 44? Is the current committee report language sufficient to provide a federal rule or will the courts resort to varying state rules for interpretation?

Answer. Proximate cause is a concept deeply rooted in traditional tort law of every state, although it does not have a precise definition. It indicates that merely because there is a cause in fact relationship between a defendant's activity and a plaintiff's harm, the defendant is not necessarily subject to liability. Proximate cause requires some reasonably close connection between the defendant's activity and the harm caused to the plaintiff. In light of the extensive case law developed on this issue in the states, it would be inappropriate to define the concept in Federal law. It should be noted here that the first question in this series criticizes S. 44 for using new terms. In my answer to that question, I pointed out that the S. 44 generally uses terms that are familiar to courts and the common law.

Question. How does an increase in the standard of proof from strict liability to negligence create incentives for improved product safety?

Answer. First, under S. 44 strict liability is imposed for manufacturing defects and violations of an express warranty. This standard is a good deal clearer than the strict liability standard in many states which, unlike S. 44, also requires proof of "unreasonableness" with respect to mismanufactured products. Under this standard, manufacturers will know that they must have perfect quality control or pay the cost of harms caused by manufacturing defects.

With respect to design defect cases, as has been indicated, the majority of states apply a negligence standard. It is true that in some of the states the standard is very unclear. The lack of clarity in the law and the diversity of rules that currently exist in the United States mute incentives for product safety, because manufacturers simply do not know what the standards for design liability are. Under a clear negligence standard, such as that in S. 44, manufacturers have a very strong incentive to accord their behavior with reasonable prudence. This is, in effect, an incentive for safety, as noted a number of legal scholars.

Question. If a jury finding on a question of fact constitutes a finding which is generic to the same question in different cases resulting from different events, does Section 4 lead to potentially unequal treatment of different plaintiffs in the same position, and to judicial inefficiencies? For example, if a jury finds that the drug DES can cause a rare form of cancer in the daughters of women who took the drug during pregnancy, why should subsequent juries have to ignore this finding?

Answer. S. 44 bars use of a finding in one case as conclusive in a second case. This is sound public policy and will not result in judicial inefficiencies. The reasons for this are manifold.

First, the initial finding or verdict may have been based on sympathy for the claimant or on facts that are not present in the subsequent case. To allow the results in the first case, based on a sympathy verdict or on unique facts, to bind the second case, would "exalt technical nicety over substantial justice." See *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 382 (E.D.N.Y. 1979).

Second, an erroneous or sympathy verdict in one case is sometimes accepted by a manufacturer or product seller, because the costs of appealing that verdict are greater than the cost of the adverse, erroneous judgment. In such cases, it is unfair to allow the finding in the first case to bind subsequent cases. The question assumes that the jury's finding in the prior case is correct; as a practical matter, that assumption is simply unfounded.

Erroneous judgments by juries may occur because they did not like the defense attorney, because evidence was admitted that should have not been admitted, or because of a thousand other things that can occur in the course of a trial of a product liability case, all of which affect the verdict on grounds other than pure merits.

Our system can tolerate errors in isolation—one wrong verdict—but the question suggests that a single product liability verdict, possibly erroneous, should result in a rule of law controlling all cases.

Third, the prior adverse judgment may be the *only* adverse judgment on the issue. The manufacturer may have prevailed on the issue in all other cases. It is unfair to permit one loss to bind all other cases.

Fourth, the jury's finding that a particular drug caused a rare form of cancer may have been correct in the individual case, but not for all future cases. Especially with cases that involve chemicals or pharmaceuticals, the unique interplay of person, environment, and other circumstances must all be considered. There may be a theoretical identity of issues among some cases, but there is not as a practical matter, an identity of issues.

For these reasons, among others, most courts in most product liability cases have rejected the application of collateral estoppel. Nevertheless, it has created extensive and costly litigation. Manufacturers have to show again and again that the issues are not identical. The Supreme Court of Ohio, in recently rejecting the application of collateral estoppel in a product liability case, adopted this view. *Goodson v. McDonough Power Equipment Co.*, No. 82-1582 (Ohio 1983).

In point of fact, the application of collateral estoppel can lead to judicial inefficiencies. First, if it is allowed, a manufacturer may be "under the gun" to appeal every case in order to reverse erroneous, adverse verdicts, even though legal costs of doing so would be extraordinarily excessive. This creates a costly administrative burden on the judicial system.

The question suggests that somehow the abolition of the doctrine may result in unequal treatment of different plaintiffs in the same position. The point is that our judicial system determines whether people are in the same position and that can only be done by evaluating the evidence in individual product liability cases. For

example, suppose the first plaintiff in the hypothetical had lost her case against the drug company. A second plaintiff comes along with the precise same complaint against the same manufacturer of the same drug. Suppose further that she is represented by the same attorney who represented the plaintiff in the first case. As a practical matter, this is often the case with medical product liability cases. Would anyone suggest that the second plaintiff's claim should be barred, because the first case was lost? I think not. They would make the very arguments that have been put forth here as to why defensive collateral estoppel is inappropriate in product liability cases.

It should be noted that S. 44 does allow collateral estoppel in the one situation where it can work fairly. Where two claims are based on harms caused by precisely same event in which two or more persons were harmed and the claimant is the same or is in privity with the claimant in the other action.

In sum, Section 4 does not result in unequal treatment of different plaintiffs, and it does not and will not lead to judicial inefficiencies. It promotes sound public policy and one that only can be achieved at the Federal level.

Question. In how many jurisdictions is it admissible to prove liability with safety innovations made in a product after harm has occurred. Have the state legislatures in these states been asked to address this issue?

Answer. Currently, there is case authority in a number of states, including California (*Ault v. Inter National Harvester Co.*, 13 Cal. 3d 113, 17 Cal. Rep. 812, 528 P. 2d 1148 (1975)), New York (*Caprara v. Chrysler Corp.*, 52 N.Y. 2d 114, 417 N.E. 2d 545, 436 N.Y.S. 2d 251 (1951)), and South Dakota (*Staffer v. Honeywell, Inc.*, 249 N.W. 2d 251 (S.D. 1976)), that proof of a post-accident design change is admissible to show that there was a defect in a product manufactured before the change was effected.

The overwhelming majority of courts have rejected the admission of such evidence. See 2 J. Wigmore, Evidence § 283 (Chadbourn Rev. 1979). There are strong reasons to exclude such evidence. First, proof of design or safety improvements is not relevant to the issue of liability in a case involving a product made before the improvement was developed.

Second, the rule excluding evidence of subsequent changes encourages manufacturers to improve the design of its products. A contrary rule can have a chilling effect, causing manufacturers to postpone the introduction of product improvements for fear that those improvements will prejudice them in cases involving preimportant products.

Third, excluding such evidence is justified by the extreme and unfair prejudice to the defendant that results from admissibility. Regardless of what evidence the defendant may introduce, jurors are likely to consider the remedial measures as an admission of liability. Of course, this is precisely the intent of the proponent.

Fourth, and finally, it is grossly unfair that a person who takes socially responsible action to improve a product and possibly to prevent harms may have such conduct used against him as evidence of his liability. In effect, he is put in a worse litigating position with respect to older products than someone who takes no action to improve his product.

State legislatures have not been asked to address this issue. The reason for this is that the issue is enmeshed with interstate commerce. As long as one state allows the admission of such evidence, we have a chilling effect on product safety. Where some states permit the introduction of such evidence, there is a major adverse impact on interstate commerce that can only be properly resolved through Federal action.

Question. It has been said that for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs. And for every dollar awarded to a claimant, he or she pays an average contingent fee of 33 cents in legal costs and therefore receives about 67 cents. Then it has been estimated (adding the average defense cost to the contingent fee) that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant. Would you provide documentation describing in detail this analysis?

Answer. The documentation for this analysis can be found in the Insurance Services Office Closed Claims Study that indicates that for every dollar that flows to claimants, 42 cents is paid in defense loss adjustment costs. See Insurance Services Office Product Liability Closed Claim Survey at 11 (1977). Our experience and practice shows that the average contingent fee in a product liability case that is litigated is 33 percent plus costs. The American Trial Lawyers' Association should be able to provide further documentation with respect to the figures.

Since these figures were presented to the Committee, the Rand Institute for Civil Justice has done a survey of 3800 asbestos claims settled before August 26, 1982.

The average claim cost defendants and their insurance companies about \$95,000. Of that amount, defendants spent \$35,000 on their own legal defense and paid \$60,000 in compensation. But out of that compensation, \$25,000 was paid in attorneys' fees.

The Washington Post editorial of August 6, 1983 observed: "It's nice for the lawyers. But does the result even remotely approximate anybody's idea of justice?"

The figures in the asbestos cases suggest that the data derived from the 1977 ISO study is out-of-date and that today more money is going to the lawyers than was originally estimated. One method of reducing legal costs in product liability cases is to end, once and for all, the 51 different sets of everchanging uncertain legal rules. Product liability law has had over 20 years of intense development—the time has come to enact fair and balanced product liability legislation, such as S. 44, which will end the need to brief and rebrief of fundamental issues and provide a harmony of guidelines to the 51 states.

Question. Does S. 44, as written, leave the states free to enforce their own statutes of repose with respect to non-capital goods?

Answer. Yes. S. 44 only covers statutes of repose affecting capital goods. These are the cases that have, according to testimony in the hearing record, been most unfair to manufacturers being sued for old products. Most consumer goods are no longer in existence after 25 years. Capital goods, by contract, may endure in the marketplace for decades. The goods that endure, however, often have been altered, modified, not repaired, or ill-treated, with the result that claims arising from them after 25 years are unjustified.

Question. Shouldn't S. 44 totally preempt in this area with its 25 year statute of repose for capital goods, if uniformity and consistency are the true objectives of the federal bill?

Answer. An argument could be made that a statute of repose should be included for consumer goods. If one were included, however, it should be considerably shorter than 25 years, because consumer goods have a life that is usually less than a decade. If a consumer goods statute of repose were added to the bill, it is essential that it be for a reasonable period of time, i.e., 10 years.

Question. If a machine is older than 25 years, the federal statute of repose would cut off claims. Should Congress enact the "Federal Age of Product Disclosure Act" in order that the user of a product over 25 years old have notice that he could not recover for an accident due to a design defect?

Answer. Enforcement of a "Federal Age of Product Disclosure Act" would require a bureaucratic mechanism with a task almost impossible to discharge. The fact is that the original manufacturer rarely knows where its goods are after 25 years in the marketplace. Machine tools are sold and resold. When machines are over 25 years old, their appearance gives some evidence of their relative safety. Again, they are really not the same machines as originally sold by the manufacturer—if they are dangerous and cause a harm, this is usually the result of a failure to maintain the machine, failure to instruct about it, alterations or modifications.

Question. Professor Jeans has stated that many cases will now be forced into an overloaded federal court since the bill reduces the product seller as a defendant. Would you comment?

Answer. S. 44 will not force new cases into the Federal courts. There is no evidence that the substantial reduction in unnecessary transaction costs brought about through Section 8 relating to product sellers will increase the number of diversity cases. No witness in the extensive hearings held on S. 2631 in the 97th Congress or on S. 44 in the 98th Congress demonstrated this assertion.

In point of fact, S. 44 is carefully drafted to avoid altering the allocation of responsibility for product liability cases between the Federal courts and the state courts. The Act states in Section 3(d) that a Federal court shall not have any new jurisdiction "over any civil action arising under this Act"

QUESTIONS OF SENATOR HEFLIN AND THE ANSWERS THERETO

Question. One of the reasons we are considering preempting state standards of liability is the claim on the part of many manufacturers that the state tort litigation system has produced unnecessarily high insurance costs. In July of 1981, *Business Insurance* magazine reported, and I quote, "Product liability insurance premiums have leveled off or plunged during the last three years." Do you agree that product liability insurance costs have decreased recently?

If yes, doesn't this eliminate one of, if not the, primary justification for the imposition of federal product liability standards?

If no, I would greatly appreciate receiving the most current evidence about product liability insurance costs. Could you provide a report on the issue?

Answer. From 1979 to 1980, product liability insurance premiums leveled off for a number of industries. Product liability insurance costs were kept level, because product liability insurance reserves earned extraordinarily high interest rates. Now that interest rates are lower, insurers will have to concentrate more carefully on product liability losses. Business Insurance and other periodicals suggest that costs could rise in the immediate future.

Testimony indicates that product liability costs have risen for a number of industries, because "the product" sold as product liability insurance has changes. For example, deductibles have risen.

The fact that product liability insurance premiums leveled off for many industries does not eliminate the "primary justifications for imposition of product liability standards." In point of fact, the record before the Senate Commerce Committee shows that S. 44 has very substantial support from businesses that are self-insured. This is because the primary justification for the bill is that the current system is extraordinarily wasteful and unfair. It is wasteful to have 51 different sets of ever-changing rules addressing how one should design or warn about products moving in interstate commerce. This system does not permit manufacturers to plan rationally for safety, for maximizing safety. It causes additional legal costs, because it requires lawyers to brief and rebrief issues in every case that are simply not clear. It diminishes the incentive to settle cases and, in fact, may make settlement more difficult. It drains off substantial amounts of money for transaction and lawyer costs. Federal product liability law will permit manufacturers to plan for safety and will reduce unnecessary legal costs. These savings, in turn, will be passed along to consumers in the context of the competitive marketplace.

Question. In 1981, we passed the Risk Retention Act in order to decrease insurance costs. I recognize that there are many aspects of the product liability issue, but shouldn't we allow the Risk Retention Act to work before undertaking as drastic a measure as the preemption of state tort law? Do you have any information about the effect the Risk Retention Act has had so far? Could you provide us with such information?

Answer. The Federal Interagency Task Force on Product Liability found that overly-subjective insurance rate-making practices were a principal cause of the product liability problem. The Carter Administration and subsequently the Reagan Administration supported enactment of the Federal Product Liability Risk Retention Act, Public Law No. 987-45. The Act addresses the rate-making aspect of the product liability problem.

The information we have about the Risk Retention Act is based on the record before the Senate Commerce Committee. The Product Liability Alliance, The Business Roundtable, the National Association of Wholesaler-Distributors, the National Machine Tool Builders' Association, and other insureds that testified about the insurance issue said that the problem of overly-subjective insurance rate-making practices had been addressed by the Federal Product Liability Risk Retention Act. Rates have remained highly competitive and the realistic "threat" by small businesses that they could join together and form their own self insurance groups has helped bring about this situation.

The Task Force also found, however, that uncertainties in product liability tort law were a principal cause of the problem. This was and is totally independent of the cause relating to overly subjective insurance rate-making practices. To address this second cause, the Carter Administration recommended the preparation of the Uniform Product Liability (UPLA). UPLA was offered, in toto, as a model for the states. The Carter Administration forwarded the model UPLA to each of the 50 individual state legislatures and Governors. The reaction to this effort was spotty. Although approximately 28 states have passed some form of product liability statute, none of these laws is the same and only a few borrow substantially from UPLA.

As early as the 96th Congress in the House of Representatives, former Congressman Richardson Pryor (D-NC), Congressman Jim Scheuer (D-NY), Congressman Jim Broyhill (R-NC), and Congressman John LaFalce (D-NY), recognized that the state-by-state approach to product liability simply would not work and that, as a result, a principal cause of the product liability problem would remain unaddressed. Extensive hearings were held and a bill, H.R. 7921, based on UPLA, was developed.

The effort to enact a Federal product liability law became, as you know, more extensive in the 97th Congress with the hearings leading to the development of S. 2631. The development of that bill borrowed heavily on the work of the Task Force, UPLA, and the efforts in the House of Representatives. It accumulated new knowledge in hearings and through comments on staff drafts produced by the Consumer

Subcommittee of the Senate Commerce Committee. Today, as the record before the Senate Commerce Committee shows, there is more uncertainty and instability in the product liability tort system than existed when the Task Force made its finding in November 1977. This cause still remains unaddressed.

Question. In 1977, the Interagency Task Force (which you chaired) indentified three causes of the product liability problem; subjective ratemaking practices by insurance companies, uncertainties in the tort system, and unsafe manufacturing practices. What aspects of the bill will remedy the problem of manufacturers not producing safe products? Does the bill increase or lessen the incentives placed upon manufacturers to produce safe products? Can we reasonably expect an increase or decrease in the number of product-related injuries?

Answer. The Task Force responded to the problem of unsafe manufacturing practices, in part, by drafting the model Uniform Product Liability Act (UPLA). In announcing the Carter Administration's approval of that effort, Secretary of Commerce Kreps stated that it would "help insure the manufacture of safe products . . . [by] preserving existing incentives in the tort litigation system" See 43 Fed. Reg. 40448 (1978).

When UPLA was drafted, this goal was kept in mind. A major criteria for UPLA was to "place incentives for loss prevention on the party or parties who are best able to accomplish that goal." See 44 Fed. Reg. at 62715 (1979). In that regard, in drafting the Act, the Task Force noted:

"The threat of tort liability in product liability judgments has prompted manufacturers to make a greater effort to produce safe products. Nevertheless, the existing state product liability law does not always place the incentive for loss prevention on the party or parties who can best achieve that goal.

"The decision where to place the incentive for loss prevention was not an easy one, and at least two factors helped determine the drafters' decision. One was pure economics which party can prevent the loss at the lowest cost? Economic analysis of preliminary drafts of this Act were helpful in this consideration.

"A second factor focused on the question of who is in the best practical position to prevent a product-related harm. This consideration may be at counterpoint with the pure economic analysis. Sometimes a product seller may be in a better practical position to implement a loss prevention technique although the product user could theoretically do so at lesser cost. * * *

This general goal has been followed in S. 44. For example, S. 44 may hold manufacturers responsible for harms even though it acted in accord with the conduct of an entire industry, if has not acted reasonably. The focus is not on what manufacturers do but on what a "reasonably prudent manufacturer" would have done. See Section 5(b). As the Senate Report on S 2631, quoting the Restatement, observed: "No group of individuals and no trade can be permitted, by adopting careless and slipshod methods to save time, effect, or money, to set its own uncontrolled standard at the expenses of the rest of the community." See Senate Report at p. 28.

S. 44 places an unequivocal incentive for loss prevention on manufacturers by holding them strictly liable for harms caused by defects in construction or by mis-manufactured products. In the practical world of manufacturing, this places the highest focus on quality control. The law in most states is less harsh, because a judgment that the product was "unreasonably dangerous" is required even though there had been a failure in quality control.

S. 44 puts a burden on the manufacturer for a continuing duty to warn. See Section 6(b). Thus, if a manufacturer discovers a hazard after the product has been produced, delivered, and sold, it cannot turn its back on potential harm. It must act as a reasonably prudent manufacturer in the circumstances. The law on this point is most unclear in many states.

S. 44 holds the manufacturer to an absolute standard with respect to promises about material facts relating to "the safe performance of the product". See Section 7. This means that, even if it was scientifically impossible to produce the product as safely as the manufacturer warranted, the manufacturer will still be liable for harms caused by the breach of the express warranty. This will prevent manufacturers from inducing sales based on promises that are impossible to keep.

S. 44 pinpoints responsibility with respect to product sellers. It holds them responsible for harms caused by their own fault. By holding manufacturers, rather than product sellers, responsible for the manufacturer's fault, S. 44 prohibits shifting responsibility onto innocent parties and places responsibility on the party that could have prevented the harm. There is an exception to this rule in Section 8. Product sellers will be responsible when manufacturers are unreachable by judicial process or out-of-business. This is, arguably, an area of "overkill" in the bill.

The comparative responsibility revisions in Section 9 also place incentives for risk prevention on the parties in the best position to avoid harm. In that regard, the law in a number of states lets manufacturers "off the hook" if the plaintiff has been at fault or the plaintiff is more than 50 percent at fault by barring the plaintiff's recovery. The same may be true with misuse or alteration of products. Under S. 44, the manufacturer is subject to liability to the extent that it was at fault or to the extent that its wrongful conduct contributed to the plaintiff's harm.

In integrating the overlap between workers' compensation and product liability law, S. 44 again follows the approach in UPLA and places incentives on the parties best able to prevent a harm. The manufacturer cannot shift its tort responsibility on to the employer. It will be liable where it causes a product harm. On the other hand, the employer cannot, as it currently can in a number of states, place the cost of workers' compensation on a manufacturer. This places an incentive on the employer to provide a safe workplace and, thus, to avoid paying workers' compensation. This entire section is premised on incentives for safety.

The statute of repose, unlike those existing in many states, provides a very long period of time during which the manufacturer is responsible. The 25-year statute of repose reaches back to the time Sputnik was launched. With respect to products that cause latent injuries, S. 44 places incentives "forever" on the manufacturer.

Unlike the law in a number of states, S. 44 tells the manufacturer that it will be responsible for punitive damages when it engages in conduct that amounts to reckless disregard for safety. Punitive damages are also applied when a claimant has been killed in a product liability incident. Surprisingly, the law in many states does not permit punitive damages in that situation.

Finally, S. 44 encourages the manufacturer of safe products by barring introduction of evidence of product safety improvements against a manufacturer with respect to its older products. The law in some states permits such evidence and dells incentives for the manufacture of safe products by creating a chilling effect on manufacturers who desire to improve the safety of their products, but are hesitant to do so for fear that such action will be used as evidence against them in suits involving pre-improvement products.

Question. It seems to me that the bill will require the state courts to interpret terms and apply legal standards with which they may be unfamiliar. Many states appear to have well-settled laws which the bill may very well unsettle. Will the bill actually achieve uniformity?

Answer. In general, S. 44 uses terms that are very familiar to courts. These terms were integrated into the Uniform Product Liability Act (UPLA) which was adopted in large part in the states of Washington, Kansas, and Connecticut and is operating there without any strain on courts. The terms, such as "reasonably prudent person", "comparative responsibility", "practical technological feasibility" have all been used by the state courts. Whenever S. 44 adopts a concept that might be new for a number of states, a careful definition is set forth in the definitions section.

How well S. 44 will perform cannot be evaluated in the abstract, but must be viewed against the present system. Today, we have a hodge-podge of 28 statutes, a myriad of ill-defined common law rules, and Federal courts "guessing" what state courts would do in particular situations. Under S. 44, we will have uniform standards that all courts can look to—an act that uses terms that are generally familiar in tort law.

Question. If we disagree with you about the proper standard of liability for design defect cases or warning cases and imposed a uniform strict liability standard instead of a negligence standard, would The Product Liability Alliance continue to support the bill?

If no, why not? Wouldn't we still achieve the goal of uniformity?

Answer. If S. 44 incorporated a strict liability standard for all product liability cases, The Product Liability Alliance would not continue to support S. 44. The Product Liability Alliance believes that the tort system in both the design and duty to warn areas should be treated as a true tort system—a system for allocating responsibility for harms caused by a product. It should not be a system of diverting or muting responsibility. If strict liability standards were uniformly used, the appropriate vehicle is not a tort system but a carefully constructed compensation system. There has been no showing at the hearings that a general tort compensation system covering all of product liability is needed at this time.

It is important to remember that the tort system imposes damages that are predicated on a showing of true fault. In that regard, persons are able to collect damages even though they have already been compensated. Data show that approximately 90 percent of Americans have some form of health insurance and have already been compensated in tort actions. The history of tort law demonstrates unequivocally

that the rule permitting a person to recover damages against a tortfeasor is predicated on the fact that the defendant has engaged in wrongdoing. Similarly, the history of tort law shows that allowing damages for pain and suffering, which are often eight or nine times damages relating to medical costs and losses of wages, is predicated on a showing of fault.

It is true that a strict liability national standard would bring about uniformity, but it would also undermine the fundamentals of the tort system. For that reason, The Product Liability Alliance could not support such a proposal.

Question. I am unaware of any act of Congress that establishes federal tort standards which are enforceable exclusively in the state courts. I know that the Federal Employees Liability Act preempts state tort law but that act creates concurrent federal and state jurisdiction. Also, until two years ago, there was no federal question jurisdiction for cases involving less than \$10,000, but that jurisdictional statute did not involve the preemption of a specific area of law traditionally left to the states. Are you aware of any statutes which preempt state tort law but which refuse to allow the federally-created standards to be enforceable concurrently in federal courts?

Answer. We believe that the Federal Employers' Liability Act is a sufficient precedent to demonstrate that S. 44 can operate smoothly in the state and federal court systems. Because a good number of product liability cases are brought in the Federal courts under normal, federal jurisdiction bases (data show there were approximately 9,000 cases brought in 1981) there will be concurrent jurisdiction in both state and federal courts. In that regard, it is our judgment that the statute will operate similarly to the Federal Employers' Liability Act. As you are aware, that Act has operated relatively smoothly with few amendments since its initial enactment in 1909.

Senator KASTEN. Thank you, Mr. Schwartz.

The next testimony will be from Prof. W. Page Keeton, representing the University of Texas School of Law in Austin, Tex. Mr. Keeton.

Mr. KEETON. Mr. Chairman, in the first place, with all due respect, I disagree with virtually everything that was said in the opening statement. I am opposed on principle to codification of tort law either at the Federal level or at the State level, because codification of the law in detail, as this bill would do, destroys the flexibility that the courts would otherwise have to deal with concrete cases and would prevent the courts from modifying, altering, and varying the law. It leads to rigidity in the law.

In the second place, I would disagree with most of the substantive changes that has been made because most of them would not really get the uniformity that we want, but rather are designed to reduce liability. Much of it would result in extensive litigation and there would be 10 years of litigation and more over the meaning of language. While I disagree substantively with a great deal of what has been done, I will mention three areas only because of lack of time.

In the first place, I do not agree that the middlemen, those who are retailers, wholesalers, and the like, should be excused from liability for selling a defective product with a flaw in it. Many accidents occur, especially after products have been installed, when it is clear that the product was defectively flawed somewhere in the manufacturing process, either at the construction level or in the marketing process, but in no way is the plaintiff able to identify at what point in time the flaw occurred.

It has been relatively easy for the plaintiff to show that the product was flawed at the time it was delivered, as when a boiler explodes and it blows out, or a tire explodes and the accident destroys the evidence. In these kinds of cases it seems quite unfair to not

have recovery when it is quite clear that the flaw occurred either in the production or the marketing process. Arrangements can be worked out and have been worked out by courts pursuant to the way a product proceeds through the production and marketing processes to obtain a fair allocation of the cost of the accident between those in the marketing chain. So I disagree with that aspect of the bill that limits liability to negligence on the part of those who sell destructively flawed products. To do so means to deny a recovery because the plaintiff cannot identify when the flaw occurs, although it is certain that it was present in the product when possession was delivered by the last seller.

I have disagreement with a good deal of what was done in the design area. If the design is one that was obvious in the sense of being an imminent risk, it would be one that would be recognized by the ordinary user. Under this bill, no matter how technological-ly feasible it might have been to eliminate that danger, there can be no recovery. I think this is especially unfair to employees in the workplace who must perforce encounter risks and hazards of products that are obviously dangerous and that could easily be designed out.

In the design area this would remove liability from the manufacturer, however defective the product and even though the harm clearly outweighs all benefits when the producer was unable under the state of the art to discover danger. I will give an illustration that is typical of cases involving prescription drugs and vaccines. The illustration relates to a vaccine that was a four-in-one vaccine. It was proved that it caused encephalitis in young children and the harm outweighed all the benefits. Under the state of the art at the time the product was produced, that could not be detected. It seems to me quite clear that the purpose of strict liability is to make it a cost of doing business that a manufacturer puts out a defectively dangerous product, whether it was his fault or not. As between the victim and the manufacturer who is in the business of making and selling products, the manufacturer should be liable where the danger clearly outweighs all the benefits.

In the third area—the product responsibility area—as I read the defenses, the No. 1 defense is misuse, such as negligent use by a person who is not a claimant and a person who is not a defendant. An example would be that of an employer. The bill eliminates entire liability. So if an employee is seriously injured without fault due to the negligence of an employer and the defective product is negligently designed, the nonnegligent employee recovers not all of his injury from the third party, but only that part of the injury attributable to the so-called comparative responsibility of the manufacturer. This does something that has never been the law in any but two or three States in the United States. In other words, it eliminates the notion of entire responsibility of each of several joint tortfeasors, even when the claimant is free from fault.

Thank you.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HEFLIN AND THE ANSWERS THERETO

Question. 1. In 1977, the Interagency Task Force (which Mr. Schwartz chaired) identified three causes of the product liability problem: subjective ratemaking practices by insurance companies, uncertainties in the tort system, and unsafe manufacturing practices. What aspects of the bill will remedy the problem of manufacturers not producing safe products? Does the bill increase or lessen the incentives placed upon manufacturers to produce safe products? Can we reasonably expect an increase or decrease in the number of product-related injuries?

Answer. In my opinion, neither this bill nor existing law nor any other set of tort principles will altogether eliminate the problem of manufacturers producing unsafe products. This bill would, however, lessen the incentive that the manufacturer now has to produce safe products, primarily because it would require proof of negligence as a prerequisite to recovery against the manufacturer who made and sold a defectively designed product. Under products liability law as it now exists throughout the country in most states, a manufacturer is subject to liability for harm resulting from a defectively designed product even though there was no negligence on the part of the manufacturer in producing such product. This is based on the assumption that in all fairness and justice, the manufacturer should bear the costs of harm resulting from defective products. It is perfectly obvious that this bill was written primarily for the purpose of decreasing liability to the extent that liability is decreased; necessarily, there is a lessening of any incentive that the tort system imposes on a manufacturer to produce safe products.

There is another aspect about this bill that I think is serious. It would make misuse by a person other than a victim or alteration of a product other than by a victim a defense that would lessen the plaintiff's recovery, even though the issues or the alteration did not prevent the product defect from causing the accident. This would, of course, greatly lessen the total liability of a manufacturer for producing unsafe products and, therefore, lessen the incentive for care and for the production of safe products.

It can be reasonably argued that tort liability will have little effect on manufacturers one way or the other. It is my position that the primary function of the tort action is not to deter but to shift the loss from a defendant to a plaintiff when in fairness and justice the loss ought to be borne by the defendant. Fairness and justice dictate the conclusion that the manufacturer should be responsible for losses resulting from defective products whether or not the manufacturer was at fault in causing the defect.

Question. 2. It seems to me that the bill will require the state courts to interpret terms and apply legal standards with which they may be unfamiliar. Many states appear to have well-settled laws which the bill may very well unsettle. Will the bill actually achieve uniformity?

Answer. It is my opinion that the bill will not achieve uniformity and it will vastly increase the amount of uncertainty in the law in a particular state. While products liability law varies from state to state, the law of a particular state has become fairly well settled. It is my judgment that this bill if passed will unsettle the law for 10 or 15 years, and each state would be interpreting the statute in its own way. Since the language used is susceptible of varying interpretations to concrete situations, it is inevitable that conflicts will arise in the various states over these interpretations. The only way uniformity could be achieved is by way of requiring the federal courts to take jurisdiction of product liability controversies, and this would be unthinkable at the present time given the volume of cases that the federal courts already have.

That part of the bill dealing with comparative fault will be very difficult for a state to apply where there are multiple defendants, some of whom are not product liability defendants. This is just another way of saying ~~and~~ you cannot carve out one area of tort law satisfactorily and make it federal law and have the remainder of tort law made and applied by the states.

Senator KASTEN. Professor, thank you very much.

The next speaker is Mr. James Sales of the law firm of Fulbright & Jaworski, Houston, Tex. Mr. Sales.

Mr. SALES. Mr. Chairman, it is kind of difficult to follow Dean Keeton, who taught me torts, and I guess I must be his biggest failure because I disagree with everything Dean Keeton has just said.

I think it important if we are to discuss product liability law to understand that we are not talking about a body of law that has

evolved over the extended jurisprudence of this country. We are talking about a body of law that was initiated in section 402A of the restatement in 1965. The basis of that law represented a codification by some academicians. It says, anyone who supplies a product is strictly liable for supplying or selling a product that is unreasonably dangerous and causes injury.

The original intent of section 402A was a very laudatory objective. It was designed to make someone who supplies a flawed product strictly liable. If the product comes off the assembly line not in compliance with specifications or blueprints, then the supplier is liable.

I do not believe that the formulators of the restatement in their wildest dreams ever visualized that this concept would be mushroomed by judicial reformulation to encompass design and warnings, situations where the product is perfectly well made but the contention is that the design configuration is such that it could be made better or that the manufacturer or supplier made the wrong alternative option in selecting 1 design over 15 other designs that were available.

The problem has been compounded even further because the courts, after the adoption of the restatement in most jurisdictions, have formulated standards for design and warning defects that absolutely boggle the mind of any rational human being, whether an appellate judge, a lawyer trying to apply it, or a manufacturer or engineer trying to adopt that standard in engineering a product, whether a car, a can opener, or a boat.

For example, California and Alaska use a test specifying that a product is defective if plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect for its intended use, or, alternatively, the product is defective if the plaintiff demonstrates the product causes injury and the defendant cannot meet the burden of proving that the benefits of that design outweigh the risks.

Texas, on the other hand, uses a balancing test. It mandates a balance of the risk of harm versus the benefits. What does that really mean to a jury? Absolutely nothing. What does that mean to the judge who is trying the case? Absolutely nothing?

What do these standards mean to the engineers back at the factory who is attempting to formulate an engineering design that will meet the standards so that when that product is marketed in a particular jurisdiction the manufacturer can safely rely on the fact that that product will satisfy the standards of a nondefective product? They cannot.

Unfortunately, each State has adopted a different standard and, as Professor Birnbaum, who has done considerable writing in the area of product liability says, these tests are very obscure, they are meaningless, and as she suggests: "As a constructive response, it is time for the courts to adopt, unequivocally and forthrightly, a pure negligence/risk-utility test in design defect cases."

Now that is not the end of the problem. The courts have gone further. In addition, they have ameliorated the original requirements of Restatement 402A and have declared, for example, in many jurisdictions, it no longer is necessary to prove that the prod-

uct was unreasonably dangerous, as done by California and Pennsylvania.

The result has been that the courts have steadily marched to the absolute brink in some jurisdictions or have approached the brink of making anyone who supplies a product in the stream of commerce, be they a manufacturer, distributor, wholesaler, lessor, seller of used products, or home builder, not only strictly liable, but guarantors. Suppliers are, in essence, insurers. The basis is social policy which is the policy of the restatement. I might add, the social policy is very important to understand.

The policy is based on socioeconomic considerations of risk distribution. That is, between the injured party on the one hand and the manufacturer, it is better that the manufacturer suffer the loss. The loss is then distributed to the entire consuming public, the innocent buyers and users of that product. We all pay the price of these shock verdicts that are coming out of every jurisdiction in this country today.

As Dean Wade, who was one of the restatement authors, observes, it is time to do something about culpability. It is not fair to innocent purchasers to pay the price either in terms of higher costs or to be deprived of the product because it has been taken off the market simply because the manufacturer has gone out of business or can no longer afford to produce it.

In closing, I would pose the issue, why not let the States handle it? Simply because most States have done nothing in 18 years. The few States that have made some attempt have only adopted the approach of adopting one or two provisions that are basically meaningless and cosmetic. No. 3, the few States that have attempted adoption of some broader type of codification have failed to achieve a parallelism, or uniformity with any sister State. It is important to note that we are dealing with products that are essentially interstate commerce. Interstate commerce in my opinion, when it is affected by the social policy of risk distribution, belongs to the Federal Government.

That is why I submit, Mr. Chairman, that Federal legislation is necessary.

Thank you.

[The statement follows:]

STATEMENT OF JAMES B. SALES, HOUSTON, TEX.

The concept of strict tort liability for products was initially memorialized in the Restatement of Torts in 1965.¹ Until the early 1960s, a cause of action for injuries and damages caused by products was based either on negligence or breach of warranty. Many attorneys however, were becoming increasingly dissatisfied with the traditional common law requirements, i.e., impediments, to recovery of damages those theories provided. The authors of the Restatement, relying in large measure on the landmark case of *Greenman v. Yuba Power Products, Inc.*,² responded by formulating Section 402A of the Restatement (Second) of Torts.

Section 402A represents the lunchpin of today's doctrine of strict tort liability or, as it is more commonly characterized, product liability. Under the Restatement, a party injured in connection with the use of any type of product may recover damages against any supplier in the distributive chain of that product upon proof that the product was defective, that it reached the consumer without substantial change from the time it left the hands of the manufacturer, that the condition of the prod-

¹ Restatement (Second) of Torts, Sec. 402A (1965).

² 377 P. 2d 897 (Cal. 1962).

uct rendered it unreasonably dangerous, and that this dangerous condition was a cause in fact of injury to the user.

Strict tort liability differs noticeably from the concept of common law negligence which has been the principal tort doctrine for recovery of personal injury damages in this country since the very genesis of our tort reparations system. Negligence evaluates the *conduct* of the product supplier while strict tort liability focuses entirely on the *condition* of the product.⁵

The underlying rationale for this unique and far-reaching doctrine is essentially socioeconomic in origin. Basically, the doctrine rests on the principle of "the deep pocket." As between an injured party and a product supplier who purportedly has made a profit either from the manufacture or the sale of a product, it is better, reason the advocates of strict tort liability, that the product supplier absorb the cost of the injury both because the supplier can better withstand the award as a cost of doing business and because the product supplier is in a better position to distribute the cost of large damage verdicts to all consumers in the marketplace.⁴

The most significant problem that has arisen has been the judicial adoption and reformulation of this concept of liability beyond the literal parameters of the Restatement. Initially, the Restatement was designed to provide injured parties a relatively easy method for recovering damages caused by products that did not meet consumer expectations, e.g., a product that was flawed or, as it is technically described, a product that failed to conform to the manufacturer's own specifications and design blueprint. As initially formulated, the doctrine was never perceived as contemplating a product that was perfectly manufactured in compliance with the plans and specifications of the manufacturer but was deemed to be defective because of some design configuration. Unfortunately, the courts harkened to the call for judicial redefinition of the Restatement and quickly liberalized the literal provisions of the Restatement to embrace, in addition to the flawed product, a design defect.⁶ Utilizing the rationale of social policy, the concept of strict tort liability was soon expanded to include products affected with marketing defects, e.g., failure to warn adequately and/or a failure to provide appropriate or adequate directions for efficient and/or safe use.⁸

Contemporaneous with the expansion of strict tort liability to design and marketing, the courts likewise judicially transformed the term "seller" in the Restatement to mean "any supplier introducing a product into the stream of commerce." As a consequence, in addition to imposing strict tort liability on retailers, wholesalers, component suppliers and distributors, many jurisdictions have extended the doctrine to sellers of used products,⁷ homebuilders,⁹ lessors,⁹ licensors and franchisors of products,¹⁰ service-sale providers such as beauticians and hospitals,¹¹ and even to successor companies when the product was manufactured by a predecessor company.¹² Concomitantly, defenses normally available in negligence and breach of war-

⁵ *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982); *Seley v. G. D. Searle & Co.*, 423 N.E. 2d 831 (Ohio 1981); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W. 2d 867 (Tex. 1978).

⁴ *Greenman v. Yuba Power Products, Inc.*, 377 P. 2d 897 (Cal. 1962); *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982); *Azzarello v. Black Bros Co., Inc.*, 391 A. 2d 1020 (Pa. 1978); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Lewis v. Times*, 697 F.2d 1252 (5th Cir. 1983).

⁶ *Pike v. Frank G. Hough Co.*, 467 P.2d 229 (Cal. 1970); *Rindlisbaker v. Wilson*, 519 P.2d 421 (Idaho 1974); *Reid v. Spadone Mach. Co.*, 404 A.2d 1094 (N.H. 1979); *Bexiga v. Havir Mfg. Co.*, 290 A.2d 281 (N.J. 1972); *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975).

⁸ *Johnig v. Coismann*, 283 N.W.2d 557 (S.D. 1979); *Williams v. Brown Mfg. Co.*, 236 N.E.2d 125 (Ill. 1968); *Tuscon Industries Inc. v. Schwartz*, 501 P.2d 936 (Ariz. 1972); *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972); *Freund v. Cellofilm Properties Inc.*, 432 A.2d 925 (N.J. 1981); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Needham v. White Labs, Inc.*, 639 F.2d 394 (7th Cir. 1981); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1981).

⁷ *Realmut v. Straub Motors, Inc.*, 322 A.2d 440 (N.J. 1974); *Houenden v. Tenbush*, 529 S.W.2d 302 (Tex. App.—San Antonio 1975, no writ).

⁹ *Kreigler v. Eichler Homes Inc.*, 74 Cal. Rptr. 749 (Cal. 1969); *Schipper V. Levitt & Sons Inc.*, 207 A.2d 314 (N.J. 1965).

¹⁰ *Price v. Shell Oil Co.*, 466 P.2d 722 (Cal. 1970); *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975); *Cintrone v. Hertz Truck Leasing*, 212 A.2d 769 (N.J. 1965).

¹¹ *Connelly v. Uniroyal Inc.*, 389 N.E.2d 155 (Ill. 1979); *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979).

¹² *Newmark v. Gimble's Inc.*, 258 A.2d 697 (N.J. 1969); *Thomas v. St. Joseph Hospital*, 618 S.W.2d 791 (Tex. App.—Houston [1st Dist.] 1981, no writ). See generally, Sales, "The Service-Sales Transaction: A Citadel Under Assault," 10 St. Mary's L.J. 13 (1978).

¹³ *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977); *Ramirez v. Amsted Ind. Inc.*, 431 A.2d 811 (N.J. 1981); *A- v. Pittsburgh Corning Corp.*, 546 F. Supp. 1033 (E.D. Pa. 1982).

ranty actions have been either totally abrogated or significantly diluted in "product liability" cases.¹³

The usual problems for the national manufacturer or distributor of products caused by increased exposure to liability has been compounded by the erratic patchwork quilt standards that have been fashioned, and, in many instances, refashioned by each jurisdiction for evaluating whether a particular product design is defective for which the supplier is strictly liable. In essence, the national manufacturer or supplier of products who introduces a product into any of the states of this country cannot design a product with any reasonable assurance that the product will not be adjudged defective by the trier of fact in a particular jurisdiction. For example, in alleged design defect cases, there are vastly differing criteria or tests by which a trier of fact is obligated to evaluate the design. In California¹⁴ and Alaska¹⁵ the standard provides alternatively that: (a) a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect it to when used in an intended or reasonably foreseeable manner or (b) a product may alternatively be found defective in design if the plaintiff demonstrates that the product design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. In Texas,¹⁶ and similar jurisdictions, a product is defective in design if "it is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." Other jurisdictions, such as New Jersey,¹⁷ deem a product defective in design if it is established that the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Some jurisdictions, such as Oregon,¹⁸ deem a product defective when a reasonable person would not have put the product in the stream of commerce if he had had knowledge of its harmful character. In Ohio,¹⁹ the test is whether a product design "is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if the benefits of the challenged design do not outweigh the risk inherent in such design." Yet other jurisdictions, such as Pennsylvania,²⁰ essentially transform the supplier of the product into an absolute insurer by declaring a design defective "where the product left the supplier's control lacking any element to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." It is apparent from a review of the standards of these jurisdictions, and the other jurisdictions utilizing yet other variations of these tests, that no manufacturer can expect to engineer a design that will satisfy the vogue, inconsistent, and generally meaningless standards by which its product will be evaluated in the various states. This may not be entirely fortuitous. More and more jurisdictions are approaching a concept of absolute liability based on a judicially perceived social policy.

The term "defect" reflects flawed products resulting from unintended mishaps in the manufacturing process. Design defects, as distinguished from the "flawed defect" impugns the manufacturer's conduct in consciously selecting alternative available design choices. Significantly, strict tort liability as articulated in Section 402A of the Restatement never contemplated the imposition of strict liability for a non-flawed product. A design defect uniquely is, and should be, judged by a standard that evaluates conduct. Negligence is the universally recognized common law standard that evaluates and judges conduct.

¹³ *Findlay v. Copeland Lumber Co.*, 509 P.2d 28 (Or. 1973); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974); *McCown v. International Harvester Co.*, 342 A.2d 381 (Pa. 1975); *Union Supply Co. v. Pust*, 583 P.2d 276 (Colo. 1978); *Hughes v. Magic Chef Inc.*, 288 N.W.2d 542 (Iowa 1980); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979). Compare, Tweraski, "The Use and Abuse of Comparative Negligence in Products Liability," 10 Ind. L. Rev. 797 (1977) with Sales, "Assumption of the Risk and Misuse in Strict Tort Liability: Prelude to Comparative Fault," 11 Tex. Tech. L. Rev. 729 (1980).

¹⁴ *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443 (Cal. 1978).

¹⁵ *Caterpillar Tractor Co. v. Beck*, 593, P.2d 871 (Alaska 1979).

¹⁶ *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979); *Clayton v. General Motors Corp.*, 286 S.E. 2d 129 (S.C. 1982).

¹⁷ *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794 (Wis. 1975); *Brady v. Melody Homes Mfg.*, 589 P.2d 896 (Ariz. App. 1979).

¹⁸ *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, rehearing denied with opinion 569 P.2d 1287 (Or. 1978).

¹⁹ *Knitz v. Minster Mach Co.*, 432 N.E.2d 814 (Ohio 1982).

²⁰ *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020 (Pa. 1978). Professor Wade, "On Product Design Defects and their Actionability," 33 Vand. L. Rev. 551 (1980) notes that Azzarello "is confusing and of uncertain significance." *Id.* at 560.

The problem presented by encompassing design defects under strict tort liability was perceptively articulated by a noted authority, on product liability law:²¹

"... Even more importantly, if as a social matter one deems it desirable to hold manufacturers absolutely liable for all product-related injuries, then a legislative approach to the problem is required so that limits can be reasonably placed upon recovery.

"Liability for conscious design defects is tortious liability, and the time has come for courts to stop creating obfuscatory tests that can only confuse jurors and deny litigants a consistently fair and just result. . . . The confused and inconsistent body of product liability case law that has emerged in the last fifteen years seriously undermines the integrity of the tort system. As a constructive response, it is time for courts to adopt, unequivocally and forthrightly, a pure negligence/risk-utility test in design defect cases."

The problem is further complicated: Many jurisdictions continue to adhere to the Restatement's requirement that the defect in the product render the product unreasonably dangerous.²² Yet, a significant number of jurisdictions have perfunctorily rejected the Restatement requirement that the defect render the product "unreasonably dangerous" as a predicate to the imposition of strict tort liability.²³ All products ever designed and manufactured have possessed some risk of danger under some circumstances. When the Courts eliminate the requirement that the risk be "unreasonable," the courts are essentially declaring the manufacturer absolutely liable. The imposition of an insurer status on product suppliers properly belongs in the legislative arena.

State of the art presents yet another problem in the design and warning cases. State of the art, as distinguished from custom or industry practice, describes the scientific technology available and feasible at the particular time the product was designed or a warning prepared. Although a number of courts have acknowledged that a manufacturer is not liable for a product that fails to possess a design or warning not then technologically feasible at the time of manufacture,²⁴ recent decisions in a number of jurisdictions unqualifiedly reject state of the art as a limitation on whether a particular design of or warning on a product renders the product defective.²⁵ Rejection of state of the art technology to impute current technology to products designed and marketed twenty or thirty years earlier is arrogance of the worst order. Yet, the idea was conceptualized to impose on the manufacturer absolute liability.²⁶ The imposition of liability on a product supplier for an alleged defect in design or warning when the engineering capability and other scientific technology was not then available or feasible represents nothing less than the imposition of absolute liability on a manufacturer simply for supplying the product.²⁷ If the imposition of absolute liability on interstate commerce based on social policy is deemed to be the law of the land, then this mandate legitimately may issue only by legislative, and not, judicial fiat.

The national manufacturer and/or supplier of products is confronted with yet another dilemma. The traditional defense of contributory fault has generally been rejected in strict tort liability actions even though it remains a viable defense in negligence and warranty actions.²⁸ Many jurisdictions designate "misuse" and/or "as-

²¹ Birnbaum, "Unmasking The Test For Design Defect: From Negligence [To Warranty] To Strict Liability to Negligence," 33 Vand. L. Rev. 593, 643 (1980).

²² *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); *Eickelberg v. Deere & Co.*, 276 N.W.2d 442 (Iowa 1972); *Potthoff v. Alma*, 583 P.2d 309 (Colo. App. 1978); *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

²³ *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972); *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020 (Pa. 1978); *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. Super. 1973); *Boudreau v. General Elec. Co.*, 625 P.2d 384 (Hawaii App. 1981).

²⁴ *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980); *Woodhill v. Parke-Davis & Co.*, 402 N.E.2d 194 (Ill. 1980).

²⁵ *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982); *Kimble v. Waste Systems International*, 595 P.2d 569 (Wash. App. 1979); *Azzarello v. Black Bros. Co. Inc.*, 391 A.2d 1020 (Pa. 1978); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).

²⁶ See, Wade, "On the Nature of Strict Tort Liability For Products," 44 Miss. L.J. 825 (1973); Keeton, "Product Liability and the Meaning of Defect," 5 St. Mary's L.J. 30 (1973); Keeton, "Manufacturer's Liability: The Meaning of 'Defect' in the Manufacturing and Design of Products," 20 Syracuse L.Rev. 559 (1969).

²⁷ See e.g., *Brady v. Mclody Homes Mfg.*, 589 P.2d 896 (Ariz. App. 1978).

²⁸ *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974); *Williams v. Brown Mfg. Co.*, 261 N.E.2d 305 (Ill. 1970); *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979); *Lewis v. Timco Inc.*, 697 F.2d 1252 (5th Cir. 1983).

sumption of the risk" as defenses or partial defenses.²⁹ Because some defenses, such as assumption of the risk, are perceived as "all or nothing" concepts, the courts have been noticeably reluctant to apply the defense in a product case.³⁰ In order to alleviate an unconscionable situation, a few jurisdictions have applied existing comparative negligence statutes to strict tort liability actions by characterizing strict tort liability as a form of "negligence per se."³¹ Several other jurisdictions have simply held that comparative negligence statutes apply to strict tort liability actions because the legislature, in enacting the statute, did not indicate that strict tort liability would be excluded.³² Other jurisdictions have applied existing comparative negligence statutes to strict tort liability but have severely limited the type of conduct that may be considered to be a hybrid form of assumption of the risk.³³ A few jurisdictions, recognizing the inequity of the existing situation, have judicially formulated a comparative fault doctrine that evaluates the total fault of all parties contributing to the injury-producing event and allocates liability accordingly.³⁴ Although a few jurisdictions have recognized the inequity and have attempted to alleviate the situation by application of some form of comparative fault, the majority of jurisdictions continue to deny the product manufacturer any meaningful substantive defenses despite gross fault by the injured party and/or by a third party such as an employer who actually caused or contributed to the accident. Whether a product supplier is entitled to a meaningful defense currently depends entirely on the fortuitous circumstance of the particular jurisdiction in which the accident-producing event occurs.³⁵

The multitude of jurisdictions that deny to the product supplier the defense of contributory fault further confirms the intent to impose insurer status on product suppliers which, unwittingly, unfairly penalizes all consumers of the product. This inherent unfairness further denigrates the tort reparations system as well as engendering a chaotic legal system to govern liability for the interstate supply of goods and products. Even one of the reporters of the Restatement (Second) of Torts recognizes the indefensible nature of ignoring the culpability of the product user. Dean John Wade recently observed:³⁶

"If the plaintiff has contributed to his own injury by his culpable conduct, he ought not to be able to cast on the manufacturer (and ultimately on all other users of the product through price setting) the cost of that culpable contribution to his injury. The rule making the plaintiff's conduct culpable may place on him certain basic obligations that should not be negated."

Additionally, a significant number of industrial accidents are caused by the tortious conduct of an injured party's employer in removing safety guards from equipment, in failing to properly maintain workplace equipment and other similar negligent conduct. In most jurisdictions, the employers are totally insulated from further liability by applicable Worker's Compensation laws.³⁷ Only a few jurisdictions permit the product supplier to seek contribution from a negligent employer.³⁸ Not surprisingly, the injured employee sues the manufacturer of the machine involved in the accident instead of the truly culpable party.

The problem is obvious. The entire doctrine of strict tort liability first articulated in the Restatement (Second) of Torts, Sec. 402A has become totally unbalanced. The manner and method of its application against a manufacturer is totally dependent on the philosophical attitude of the particular jurisdiction involved. Unfortunately, that philosophy is moving toward a form of absolute liability with no limitations on the amount of damages that may be recovered.

²⁹ *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Ford Motor Co. v. Matthews*, 291 So.2d 169 (Miss. 1974); *Keerns v. Engelke*, 369 N.E.2d 1284 (Ill. App. 1977); *Mico Mobile Sales & Leasing v. Skyline Corp.*, 546 P.2d 54 (Idaho 1975).

³⁰ See, Sales, "Assumption of the Risk and Misuse in Strict Tort Liability: Preclude to Comparative Fault," 11 Tex. Tech. L.Rev. 729, 738 (1980).

³¹ See e.g., *Dippel v. Sciano*, 155 N.W.2d 55 (Wis. 1967).

³² See e.g., *Sun Valley Airlines Inc. v. Avco-Lycoming Corp.*, 411 F.Supp. 598 (D. Idaho 1976).

³³ *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979).

³⁴ *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979).

³⁵ Compare *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978); with *Caterpillar Tractor Co. v. Gonzales*, 599 S.W.2d 633 (Tex. App.—El Paso 1980, writ ref. n.r.e.).

³⁶ Wade, "Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act," 29 Mercer L.Rev. 373, 387 (1978). In essence, strict tort liability, in most jurisdictions, rewards the culpable user of products to the detriment and expense of careful and prudent consumers.

³⁷ See generally, Larson, "Workmen's Compensation—Third Party Actions Against Employers," 65 Northwestern L. Rev. 351. See e.g., *Grove Mfg. Co. v. Cardinal Const. Co.*, 534 S.W.2d 153 (Tex. App.—Houston [14th Dist.] 1976 writ ref. n.r.e.).

³⁸ See e.g., *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437 (Ill. 1977).

The doctrine of strict tort liability has evolved in an explosive and, in many instances, irrational manner. The erratic nature of the doctrine's development, the expansion of the doctrine beyond the literal provisions of the Restatement section which sired the doctrine, and the varying manner in which strict tort liability has been imposed on manufacturers and suppliers of products has, in too many instances, approached the point of imposing a guarantor status on the manufacturer. This has occurred notwithstanding that strict tort liability, in legal theorem, was formulated as an *ex delicto* and not an *ex contractu* cause of action.

Punitive damages provide a further area of real concern in the strict tort liability area. The concept of punitive or exemplary damages evolved in the common law to punish outrageous conduct involving malice, oppression, fraud or wanton disregard of the rights of others.³⁹ The award of punitive damages possesses a dual purpose: to punish willful, malicious, and wanton conduct and to deter such egregious conduct of individuals in the future.⁴⁰ Despite the acknowledged fact that strict tort liability is based entirely on the condition of the product and not the conduct of the product supplier, the doctrine of punitive damages is being applied. Despite the incongruity between the judicially formulated doctrine of strict tort liability and the doctrine of punitive damages for malicious or wanton conduct, an increasing number of recent decisions reflect a judicial activism in applying punitive damages against product suppliers.⁴¹

A number of cogent reasons decry the applicability of a doctrine designed to punish an *deter conduct* to a cause of action forged on the socioeconomic premise of risk distribution. Since the *condition* of the product and not the *conduct* of the product supplier represents the sole underlying basis for recovery of compensatory damages, punitive damages which require an award of compensatory damages and which depend entirely on outrageous conduct and not the condition of the product totally contradicts the legal theory on which it is predicated. A number of courts have summarily rejected this argument without any real analysis of the incompatibility of the two concepts.⁴² One recent decision, however, has recognized the incompatibility of the two doctrines.⁴³

Perhaps the most important basis for rejecting application of punitive damages in a product context involves the economic impact of repeated awards of punitive damages for an identically designed product—a form of overkill.⁴⁴ Almost all products that are designed and manufactured are the result of years of design evolution generated by countless thousands of engineers. The end product represents the election of alternative design options by the manufacturer. Realistically, no design represents the action of a single individual. Once the design election has been made, every product of that same line contains the identical design configuration. If punitive damages are awarded for a defectively designed product, then every product of that identical design line is subject to a punitive award. How many times may a manufacturer be punished for the same design? Even criminal acts may not be punished more than once. A number of commentators, although recognizing the nature of the product design process and the severe economic threat presented by punitive damages, applaud the use of punitive awards in strict tort liability.⁴⁵ A few writers

³⁹ See generally, *Nielson v. Flashberg*, 419 P.2d 514 (Ariz. 1966); *Jolley v. Puregro Co.*, 496 P.2d 939 (Idaho 1972); *Newton v. Hornblower, Inc.*, 582 P.2d 1136 (Kan. 1978); *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).

⁴⁰ See e.g., *Campbell Estates Inc. v. Bates*, 517 P.2d 515 (Ariz. App. 1973); *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518 (Ark. 1972); *Leimgruber v. Claridge Assoc., Ltd.*, 375 A.2d 652 (N.J. 1977); *Christman v. Voyer*, 595 P.2d 410 (N.M. App. 1979). See "Restatement (Second) of Torts," Sec. 908(1) (1973).

⁴¹ See e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348 (Cal. App. 3d 1981); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), cert. denied, 449 U.S. 911 (1980); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978); *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Ala. 1979); *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568 (Ohio 1981); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650 (5th Cir. 1981); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975); *Rawlings Sporting Goods Co., Inc. v. Daniels*, 619 S.W.2d 435 (Tex. App.—Waco 1981, writ ref. n.r.e.); *Hasson v. Ford Motor Co.*, 650 P.2d 1171 (Cal. 1982); *Neal v. Carey Canadian Mines Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982).

⁴² See e.g., *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980); *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348 (1981).

⁴³ *Gold v. Johns-Manville Sales Corp.*, 553 F.Supp. 482 (D.N.J. 1982).

⁴⁴ This was the serious concern voiced by Judge Friendly in *Roginsky v. Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967).

⁴⁵ Although many commentators support the use of punitive damages in strict tort liability actions, they acknowledge, however, that punitive awards in design and marketing defect cases pose potential dangers. See, Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 Univ. Chicago L.Rev. 1 (1982); Mallor & Roberts, "Punitive Damages: Toward a Principled Approach," 31 Hastings L.Rev. 639 (1980).

have suggested that the punitive damage concept is incompatible with and should not be applied in a strict tort liability context.⁴⁶

The inquiry may be posed: Why not permit this doctrine to remain exclusively within the ambit of judicial analysis and interpretation rather than defer to state or federal legislation? The principal argument for reform is, of course, that from its inception, the doctrine of strict tort liability has been premised on a socioeconomic theory that the manufacturer-supplier of a product is better able to absorb the cost of injuries sustained in a product-related accident. This deep pocket theory and its corollary precept of distributing the risk among innocent consumers is exactly the type of policy evaluation that more appropriately belongs within the province of the legislative rather than the judicial system. Even more significantly, an analysis of the tidal wave of product liability cases disclose that an increasing number of jurisdictions are, in actuality, imposing a form of absolute liability on manufacturers by use of obfuscatory tests for evaluating a defect, by allowance of the most tenuous circumstantial and "expert" evidence to support liability and by foreclosing the use of any substantive meaningful defenses. As Professor Birnbaum notes in her recent law review article, "[i]f . . . it is desirable to hold manufacturers absolutely liable for all product-related injuries, then a legislative approach to the problem is required. . . ." ⁴⁷ Yet, the doctrine of strict tort liability has been adopted, formulated, refined, and applied solely through the judicial system and without any effective or meaningful legislative consideration or intervention.

The added inquiry may be posed: Why not permit each state to approach this problem in its own legislative fashion? When the problem is placed in perspective of the eighteen years since strict tort liability surfaced under the rubric of Sec. 402A, individual state action has been, and will be in the future, totally ineffective to remedy the myriad of problems currently existing. Other than perhaps in connection with the few manufacturers and suppliers whose products are distributed solely within the boundaries of a single state, there are three basic reasons that explain the futility of state action: (1) most states have failed, despite repeated efforts, to enact any type of product liability reform law to alleviate the existing unbalance; (2) the token reform of some states in adopting limited sections of the Uniform Product Liability Act or other similar models that act as a bandaid approach to product liability reform has been essentially cosmetic; and (3) the states that have enacted a comprehensive product liability reform program have failed to establish any real uniformity or parallelism with the product liability reform laws of their sister states. This presents, therefore, an unattractive environment for national and international manufacturers and suppliers of products to market their products. Moreover, individual state laws that would presume to regulate the interstate sale and use of products intrudes on an area that from the earliest days of the republic have properly been assigned to the federal government.

Many attorneys question the need for any product liability reform. A significant group argues rather forcefully that the judicial adoption, implementation and expansion of strict tort liability has compelled manufacturers and suppliers of products to bear the cost of compensating individuals injured in product-related accidents and has helped insure that manufacturers design and manufacture only the safest possible product in order to avoid liability. It is true that manufacturers have absorbed the loss caused by product user injuries but, because of the absence of any meaningful uniform standards or guidelines, it is questionable in the extreme to suggest that this has enabled the manufacturers to make products better and less likely to cause injury. In rebuttal, the inquiry may be posed whether the socioeconomic concept of risk distribution imposed on interstate manufacturers and suppliers of products under the present situation is fair to the innocent consumers who purchase these products in the marketplace. It is axiomatic that the cost of large judgments and the many more settlements prompted by fear of the now common place shock damage awards and the increased cost of insurance premiums must be factored into the cost of the product. The payment for this additional cost is borne by the innocent consumers of the product either in the form of increased costs or the absence of the product from the marketplace.

Although the larger manufacturers of products are managing to shoulder the economic burden of unfettered strict tort liability, the smaller manufacturers and suppliers, as well as the small "mom and pop" operations cannot, and, in fact, have not

⁴⁶ Fulton, "Punitive Damages in Product Liability Cases," 15 *The Forum* 117 117 (1979); Sales, "The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel," 14 *St. Mary's L.J.* 349 (1983).

⁴⁷ Birnbaum, "Unmasking the Tests For Design Defect: From Negligence [To Warranty] to Strict Liability to Negligence," 33 *Vand. L. Rev.* 593, 643 (1980).

survived the impact of this doctrine. Many of these concerns have long since terminated business, either because of large judgments or because the cost of purchasing insurance to continue in business has been prohibitive. This, in turn, has resulted in the termination of many employees who otherwise are deprived of gainful employment. The economically disastrous consequence of unrestrained liability is reflected in the Johns-Manville Corp. chapter 11 bankruptcy proceeding arising in the context of the asbestos litigation. Tragically, this represents but the tip of the iceberg. No business can withstand indefinitely the ravenous appetite of large strict tort liability verdicts.

The doctrine has engendered other problems. Manufacturers and producers of products, whether new appliances, machinery or prescriptive medications, have traditionally utilized American ingenuity, creativity and a pioneering spirit in developing newer and more sophisticated products which have materially benefitted the public. With the advent of strict tort liability, this creativity and willingness of manufacturers to pioneer in yet uncharted areas of technology has been diminished. This represents a very real loss to the public. Contrary to the clamor of its advocates, strict tort liability creates a very real disincentive to manufacturers to pioneer uncharted areas.

The doctrine of strict tort liability, when properly balanced with the interest of both the injured party as well as the manufacturer and supplier, may represent an acceptable legal doctrine in our system of jurisprudence. In its present unbalanced state, however, it is precipitating unacceptable economic repercussions. It seems only appropriate that the doctrine be scrutinized in the national legislative forum and that, after due and appropriate consideration of all interests affected by this doctrine, appropriate legislation be enacted both to restore a much-needed balance and to structure uniform standards for evaluating product integrity. Unless and until the Congress acts, the chaos will continue and the vitality of the national economy will be further impaired.

Uniform federal legislation, indeed, is an appropriate approach to a problem that involves interstate commerce. Unlike legal doctrines that address such tort actions as automobile accidents that occur within a particular state's boundaries, professional malpractice that occurs between residents of a particular state and within that state's boundaries, or other similar torts involving entities and accidents located and occurring within certain geographical boundaries, the national distribution and use of products transcends state boundaries. Interstate commerce should not be subjected to the political and judicial vagaries of fifty different state's laws.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question 1. Does it strike anyone as odd that leaving the law totally to the states would result in a situation in which if I were to drive my car back to Wisconsin, it would be safe in Maryland, defective in Pennsylvania, safe in Ohio and Indiana, defective in Illinois and safe again in Wisconsin? Doesn't that strike you as odd? And doesn't it strike you as odd that we would decide whether or not a jet aircraft is defective by determining whether it crashed on the Maryland or Virginia side of the Potomac?

Answer. The situation you describe is not only odd but it is intrinsically unfair and subjects product suppliers to liability for large damage awards dependent on the vagaries of the law of the jurisdiction in which a cause of action is instituted. Under current standards, each jurisdiction imposes liability under its own uniquely formulated judicial measurement of whether a product is defectively designed or marketed. As a consequence, the product supplier cannot market its product in interstate commerce with any assurance that the product will not be adjudged defective in a number of jurisdictions while, at the same time, being judged nondefective in a significant number of other jurisdictions. When interstate commerce is so uniquely involved, as it is in the product liability area, fairness would appear to dictate that the product supplier be accorded the simple and yet extremely important concept of fairness in having a uniform standard by which to evaluate the potential of liability, irrespective of which jurisdiction the product may migrate in its interstate distribution.

Question 2. Isn't it true that a negligence of fault-based standard of reasonable care applied to actions involving architects, engineers, lawyers, doctors, and just about everybody? Would you care to comment?

Answer. The concept of negligence or fault has constituted the standard for evaluating the potential liability of architects, engineers, lawyers, doctors, and all members of society. The basis for imposing liability and the resulting obligation to pay damages traditionally has been predicated on the tortious conduct of the alleged wrongdoer. It is a standard that evaluates conduct as distinguished from the concept of strict tort liability in the products area which evaluates only the condition of the product and not the conduct of the product supplier. Unless someone is engaged in a course of conduct proscribed by the rules of society, the individual may not be subjected to large awards of damages simply for being involved in an accident-producing event.

Question 3. Is it true that S. 44 would "prohibit victims of defective products from recovering money damages from a manufacturer unless they can prove the manufacturer knew the product was defective"?

Answer. According to my understanding and interpretation, S. 44 would not preclude an injured party from recovering damages from a manufacturer in the absence of proof that the manufacturer actually knew that the product was defective. S. 44 merely prescribes that liability cannot be imposed upon a supplier of a product unless the manufacturer has failed to exercise reasonable care in the design and marketing of the product. The standard is that the manufacturer actually knew or should have known that the particular design selected or the particular warnings and directions utilized failed to satisfy the standard of reasonable care under all the circumstances.

Question 4. Is it true that "under present law . . . someone injured can recover money simply by proving the product defective" and "is not required to prove manufacturer negligence"?

Answer. In all but a handful of jurisdictions, a manufacturer is subject to strict tort liability merely upon proof that the product manufactured or supplied is defective and unreasonably dangerous. Although the injured party may utilize the doctrine of negligence, most plaintiffs sue solely under the concept of strict tort liability in which instance negligence is neither required nor relevant.

Even under strict tort liability, a number of jurisdictions, such as California, New Jersey, and Pennsylvania, have abolished the requirement of proving that the defective product was unreasonably dangerous. Merely proving a product defective by whatever nebulous standard a particular jurisdiction may have adopted and establishing cause in fact results in liability being imposed upon the manufacturer. Under this liberalized interpretation of strict tort liability the jurisdictions are moving even closer to imposing a form of insurer status on anyone who supplies products in the distributive marketing chain.

Question 5. Does S. 44 "discourage manufacturers from doing research"?

Answer. S. 44 does not discourage manufacturers from pursuing research. In fact, S. 44 undoubtedly will encourage research and provide incentive to develop new and better products because the specter of strict tort liability will not loom simply because the product might be adjudged defective by the currently meaningless standard of an appreciable number of jurisdictions. The manufacturer will be subject to liability in pursuing research and development of new and different products only by the standard of reasonable care under existing circumstances.

Question 6. Is it true that under S. 44, persons injured by drugs, asbestos, and exploding gas tanks have no hope of recovery?

Answer. Persons injured by drugs, asbestos, and exploding gas tanks certainly are not foreclosed from recovering damages under S. 44. Nothing could be further from the realities of S. 44. In the event the injured party establishes that in the course of distributing the product the particular supplier failed to exercise reasonable care, a basis for recovery will exist.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question 1. It frequently has been asserted that increases in the cost of product liability insurance and in the number and size of product liability judgements have led manufacturers to go out of business. Would you please provide any studies, statistics, or references to studies which support these assertions? Also, could you please provide any specific examples of firms that went out of business as a result of product liability problems, and as much information as possible about the firm, including the name of the firm, the year the firm ceased its business operations, the type of products that the firm manufactured, the number of injuries related to products manufactured by the firm, the number of claims made regarding such injuries,

the number of product liability lawsuits actually filed against the firm, and the number and amount of recoveries in such lawsuits.

Answer. I do not have access to the statistical studies to which this question apparently alludes. Undoubtedly, manufacturers and/or various insurance companies should have available these statistics. There obviously are problems as evidenced by the Chapter 11 proceeding of Johns-Manville Sales Corporation in the asbestos litigation. I apologize that I do not have more statistical data and reference materials but my experience with products liability has been simply as a trial lawyer involved in litigating product liability cases for the past 15 years.

Question 2. In light of the fact that the bill would require the state courts to interpret terms and apply legal standards with which they may be unfamiliar, and in light of the fact that many states appear to have well-settled liability rules which the bill may very well disrupt, how do you believe that the bill in fact will achieve its stated goal of uniformity? What effect will the initial, and perhaps lengthy period, of new interpretation and confusion following the creation of federal standards have on transaction costs? Please provide any studies or statistics which show how much in transaction costs would be saved if uniform standards were imposed?

Answer. Once again, I must defer to other sources for statistical data. As I mentioned in response to an earlier question, I am a trial lawyer and do not maintain this type of statistical compilations. In response to the other portion of this inquiry, most states do not have well-settled liability rules. As an example, the State of California has altered its standard for evaluating design defect on several occasions and its present standard is continually being questioned in the California appellate courts. See *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). Likewise, Texas earlier utilized the standard of reasonable expectations in evaluating design defects. Then, in *Hopkins v. General Motors Corp.*, 548 S.W.2d 344 (Tex. 1977), it adopted a bifurcated test which provided a totally different and disjunctive test for evaluating design defects. After several years of confusion, the Texas Supreme Court repudiated in *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), the bifurcated test that it earlier formulated and adopted the utility versus risk standard that currently governs product liability cases. I believe that a review of the judicial decisions in the various jurisdictions will quickly disclose that the law is anything but well settled on such critical issues as the standard by which defect is to be determined, the defenses that apply and the circumstances under which a defense will be recognized, the rules that govern admissibility of evidence, the legal entities who are subject to strict tort liability such as lessors, sales-service providers, licensors and others.

Question 3. Are you aware of any statutes which preempt state tort law, but which do not create either concurrent federal and state jurisdiction or a federal administrative mechanism? Are you aware of any federal statutes which preempt state law, but which do not create either concurrent federal and state jurisdiction or a federal administrative mechanism?

Answer. I apologize but I simply do not understand this particular inquiry.

Question 4. Take the following example. A passenger is injured in an automobile accident. It is proven that the brakes on the car were defective, and that the driver was negligent. Although these are joint causes, either would have caused the plaintiff's injuries. The plaintiff is not responsible to any degree for the accident. A jury determines that 40 percent of the responsibility of the accident should be attributed to the manufacturer of the automobile and that 60 percent of the responsibility should be attributed to the negligent driver. The jury determines that total damages are one hundred thousand dollars. The state in which the accident occurs has a statute or common law rule which grants the driver of the automobile immunity for liability for injuries suffered by his or her passenger. Under the act, it appears that the plaintiff would be able to recover forty thousand dollars from the manufacturer of the automobile. Is this correct? If so, do you think that this is a fair result in light of the fact that the defective brakes alone would have caused the accident?

Answer. There is some question in my mind that the act as currently written provides the result that you presuppose in this particular question. As a personal matter, I believe that the allocation of liability should be determinative in apportioning the amount of damages among the various tortfeasors. In the question that you hypothesize, the jury, after hearing all the evidence, has determined that one tortfeasor is 40 percent and the other is 60 percent the cause of the accident and resulting injury. Under the concept of assigning percentages of fault, it would appear only fair that the manufacturer pay the 60 percent of the total judgment. Joint and several liability, in my opinion, constituted a necessary and viable concept when contributory fault on the part of the plaintiff represented an absolute bar to recovery of any damages. With the advent of comparative fault either by statute or by judicial decision, such as *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978),

each party is adjudged that portion or percentage of a total judgment that the trier of fact determines that defendant contributed to the accident and resulting injuries. I believe this represents a fair approach to allocating responsibility for accidents. The fact that a particular state precludes an injured party from suing another citizen of the state because of a guest statute or other similar statutory or judicial prohibition should not visit more fault or responsibility upon someone than the trier of fact determines to be less than 100 percent responsible for the accident and resulting injury. The concept of joint and several, in jurisdictions possessing the mechanism for apportioning fault, is simply outmoded.

Question 5. One month after a boiler is manufactured, it is sold by a retailer and blows up one day after installation. The plaintiff proves by clear and convincing evidence through expert testimony that the accident would not have happened but for a defect which existed at the time possession of the boiler transferred from the retailer to the consumer. However, the explosion destroys all evidence about the precise cause of the accident. It cannot be determined whether there was a defect in construction or mishandling by the retailer. There is one hundred thousand dollars in damages. Under the act, would you explain what you think the innocent victim would recover?

Answer. I am unable to give a definitive response since there simply are too many additional facts necessary to determine liability that are not included in the hypothetical question. Based on considerable speculation of a number of omitted facts, I believe liability would be established.

Question 6. Would the plaintiff recover under Professor Page's hypothetical concerning a line of defective pacemakers? If you recall, after a pacemaker is implanted in the plaintiff, it is discovered that 10 percent of the pacemakers in a particular batch suffer from a construction defect. It is necessary for the plaintiff to undergo surgery to replace his pacemaker. It turns out that the plaintiff's pacemaker is not one of the defective pacemakers. The plaintiff sues for the costs of the second surgery and the consequent pain and suffering. If you conclude that the plaintiff would recover under the bill, could you explain why and under which sections of the bill? Do you believe that in an action brought under the common law the plaintiff would have a better chance of recovery than under the bill? Why or why not?

Answer. Unfortunately, I did not hear Professor Page's testimony nor have I been provided a transcript to determine the testimony furnished by Professor Page.

Under the additional facts that you provide in the question, I can only assume that the pacemaker that is removed from the plaintiff was defective even though it was not part of the batch that was designated to be defective by the manufacturer. If it is defective, i.e., it has a flaw which interferes with its normal function, then liability ensues. This hypothetical does involve a design or marketing problem and, as I understand the question posed, it appears that the plaintiff recovers either under the existing section 402A Restatement (Second) of Torts or under S. 44.

I am unable to answer the additional question regarding chances of recovery under the common law negligence concept. In order to answer the question, it would be necessary to determine the precise defect in the pacemaker that necessitated the second surgical implant and the evidence that would establish the nature and type of defect in the pacemaker at the time it was supplied by the manufacturer. If, for example, the pacemaker failed because of an inadequate electrical connection and evidence establishes that the manufacturer failed to provide a quality control check of all electrical connections before packaging the pacemakers for transportation and sale, then common law liability under negligence would undoubtedly follow.

Question 7. S. 44 says a product is unreasonably dangerous in design or formulation if a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation that the manufacturer used. Isn't innovation necessary for American industry to lead the world in the design of new products? Do you think that S. 44 might discourage the designing of new products since other manufacturers in the same circumstances might not have taken the same risk? Also, do you believe that the company which designs a new product, which its competitors chose not to design, will face an increase in product liability suits because of S. 44?

Answer. Innovation indeed is the one area that American industry early proved its superiority against foreign competition. Under the current state of strict tort liability, innovation and pioneering is discouraged because liability results simply from the condition of a new product, irrespective of the exercise of reasonable care by the manufacturer in pioneering a new formulation or a new design. S. 44 merely states that the manufacturer, in pioneering new designs and new formulations, exercise reasonable care under the circumstances. Under these circumstances, the jury or trier of fact will evaluate whether the manufacturer exercised that degree of care

that a normal manufacturer would have utilized. This would involve an evaluation of the latest engineering technology, newer metal alloys or chemicals, and adequate testing.

In response to the additional inquiry, I am not persuaded that S. 44 will adversely affect competition. In fact, it probably will increase new products since manufacturers of any product survive only if they build a better computer, vehicle, appliance or mousetrap. It is only when strict tort liability makes the sale and distribution of a product unduly costly that it frustrates the economic feasibility of marketing products. A good example of the effect of the current law is the manufacturer and sale of football helmets. Currently, I believe there are only three manufacturers of football helmets and even that small number is expected to dwindle as the huge monetary awards continue under strict tort liability. Costs are a significant concern. However, the continued availability of utilitarian products in the marketplace is an equally compelling concern.

Question 8. In certain cases, will federal law apply to the conduct of some parties and state law apply to the conduct of other parties? For example, after an automobile accident, suppose it is alleged that all of the following were causes of an automobile accident: the injured driver was negligent, the brakes on the car were defectively manufactured, a pedestrian crossed in front of the car without looking, and the state had failed to repair a defective crosswalk light. Which law, state or S. 44, would apply to determine the responsibility and liability of the driver, manufacturer, pedestrian, and state respectively?

Answer. The law of the state would govern the conduct of all participants in the accident such as the driver of the vehicle, the pedestrian and the state. The rules promulgated under S. 44 would be applied by the state and govern the potential liability and damage responsibility of the manufacturer of the brakes on the automobile. This is no different than the situation that is necessarily included in this particular question. For example, in the State of Texas, the liability and damage potential of the state is governed by the Texas Tort Claims Act and there exists a limitation on the amount of damages that can be awarded against the state, irrespective of extent and degree of fault. The courts have encountered no difficulty in applying the law that is peculiar to the state's responsibility in a multiparty lawsuit that involves other negligent parties who are deprived of any limitation on damage liability.

Question 9. If you consider national uniformity the principal reason why a federal cause of action for products liability is desirable, then would you support federal enactment of Restatement (Second) of Torts section 402A, which is already law in about two-thirds of the states? Why or why not?

Answer. I would support federal enactment of Restatement (Second) of Torts section 402A as it was originally promulgated and with the limitations implicit in its original enactment. I would oppose utilization of section 402A as it has been judicially expanded. Specifically, section 402A, as originally promulgated, envisioned the flawed product, i.e., the product possessed an intrinsic defect and did not comply with the manufacturer's own blueprints and specifications. Under those circumstances, liability should be strict. S. 44 retains this concept. I disagree that the concept of strict tort liability as articulated in section 402A should be applied to design and marketing defects. Design and marketing involve conduct and should be evaluated by a conduct standard, i.e., negligence. There is an excellent discussion of this concept by Professor Birnbaum in an article entitled "Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence," 33 Vand. L. Rev. 593 (1980).

Question 10. S. 44 excludes recovery for mental distress in the absence of physical harm. If a plaintiff can prove that he suffered severe mental disturbance as the result of witnessing a family member being killed by a defective product, do you think he should recover? Why or why not? Would your answer be the same if he proved that the defect had resulted from the defendant's negligence, or from the defendant's reckless disregard for the safety of persons who might be injured by the product? Why or why not?

Answer. I do not believe that mental anguish should be a recoverable item of damage to a bystander who witnesses an accident to another family member. I support recovery for mental anguish sustained by a bystander who witnesses the accident and who is in the zone of danger and thereby subjected to the potential of physical harm by the injury-producing event. In a fairly recent article entitled "Limitations on the Recovery of Damages in Personal Injury Actions," 18 So. Tex. L.J. 217 (1977), I outlined the problems involved in bystander recovery of mental anguish for injuries caused to another and my reasons for limiting recovery in that instance. I think that recovery in this type of situation should be foreclosed

whether the basis of liability is predicated on strict tort liability, negligence or gross negligence.

Question 11. S. 44 defines "product seller" as a person who sells or otherwise distributes a product "in the course of business conducted for that purpose." Would the quoted phrase absolve sellers who regularly distribute in product where distribution of the product is only tangential to the seller's main business? For instance, would a bank be liable for a product it regularly gave away as an inducement to open new accounts? Do you think it should be (at least in the same circumstances of other sellers under S. 44)? Why or why not?

Answer. In the absence of an unintended interpretation of the phrase, I believe that this provision excludes from liability those who provide products who are not regularly engaged in distributing the product in the regular course of their business. Using the hypothetical provision of this question, I do not believe the bank should be liable for a gratuitous gift furnished to customers as an inducement to open a new account. This does not preclude a party who may have been injured by the product from initiating an action against the manufacturer and seller of that product. Again, my views on the hybrid sales-service situation is more comprehensively detailed in an article I wrote entitled "The Service-Sales Transaction: A Citadel Under Assault," 10 St. Mary's L.J. 13 (1978). Several jurisdictions have to expand even the liberal provisions of section 402A to the refused gratuitous furnishing of a product. For example, the court in *Gobhai v. KLM Royal Dutch Airlines*, 445 N.Y.S.2d 445 (1981), held that slippers furnished by an airline to its customers-passengers would not entitle the passenger to maintain a strict tort liability action for defective slippers against the airline.

Question 12. S. 44 adopts a negligence standard in design defect cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. S. 44 adopts a negligence standard in design defect cases. The negligence standard can be meaningfully differentiated and, in fact, constitutes the only meaningful standard for evaluating the conduct of the manufacturer in selecting a particular design over numerous other options available for a particular product. As I have mentioned in response to an earlier question, Professor Birnbaum in an article entitled "Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence," 33 Vand.L.Rev. 593 (1980), very concisely and analytically sets forth the underlying basis for a negligence standard in design defect cases.

Question 13. S. 44 makes a plaintiff's misuse of a product a defense, even where such misuse was foreseeable to the manufacturer and had not been warned against. Do you think this is desirable? Why or why not?

Answer. Misuse should be a defense to the extent that the trier of fact assesses a percentage of misuse as a causative factor in the accident and resulting injury. It is the fact that the product was not used for its intended purpose which constitutes the defense. If someone uses a product for a purpose for which it was not designed, sold or intended to be used, then implicitly a warning is not necessary since the user is well aware that he or she is using the product for a purpose it was never designed to serve.

Misuse, in my opinion, is simply a more gross form of contributory negligence and therefore should be encompassed by the concept of comparative fault.

Question 14. S. 44 would in effect postpone several liability of joint tortfeasors by making each defendant liable only for his share of the damage award unless the court determines that part of the damage award is not collectible from a particular defendant. Do you think this is desirable? Why or why not?

Answer. Joint and several liability is a concept whose time has come and passed. Joint and several liability was a fair doctrine at a time when contributory negligence of an injured party constituted a complete bar to recovery. With many jurisdictions now abandoning contributory fault as a complete bar and utilizing various forms of pure comparative fault in negligence, the rationale and reason for joint and several liability no longer exists. If a party is determined by a jury to be 40 percent at fault in causing an accident and resulting injury, then it appears unfair to make that party pay a larger percentage of the judgment than the trier of fact assessed against that tortfeasor. The entire concept of joint and several under the more modern jurisprudential approach to tort reparations is not warranted.

Question 15. S. 44, unlike the law in many states, would reduce a plaintiff's award if the plaintiff should have known of the defective condition and if the failure to know contributed toward the plaintiff's injury. Do you think this is fair? Why or why not?

Answer. I believe that the trier of fact should evaluate the conduct of all parties involved in an injury-producing event. Irrespective of the nature of the conduct, if the trier of the fact determines that a particular course of socially unacceptable conduct caused the accident and allocates a percentage of fault to that conduct, that assessment should govern the respective liabilities of each party to that injury-producing event.

Question 16. In cases in which a defective product and a negligent employer had both contributed to an employee's injury, and the employer and employee were under a worker's compensation statute, S. 44 would reduce the manufacturer's liability by the amount of the worker's compensation benefits if such benefits were greater than the share of the damages for which parties other than the manufacturer were responsible. Do you think this is desirable? Why or why not?

Answer. This is a desirable and long overdue modification. A significant number of accidents are attributable to the conduct of the employer in altering products used in the plant and in failing to maintain these products in good working order. Again, alluding to the fairness standard which underlies the justice system, it appears unfair to impose upon the manufacturer of a product full liability for an injury-producing event when the principal cause of the accident was the conduct of the employer. Several jurisdictions have judicially formulated and adopted this approach. See *Maio v. Faks*, 14 A.2d 105 (Pa. 1940), and *Lambertson v. Cincinnati Corporation*, 257 N.W.2d 679 (Minn.).

Question 17. Do you think a period of limitations from the date of first sale is desirable? Why or why not? Assuming you think such a period of limitations is desirable, do you support the 25-year period in S. 44, applicable only to capital goods and only in design defect and failure to warn cases? Would you shorten it, lengthen it, or extend it to manufacturing defect or breach of express warranty cases? Why or why not?

Answer. A statute of repose is desirable. There are several justifications for a statute of repose. One justification involves lack of reliability and availability of evidence after the lapse of an extended period of time following manufacture and sale of a product. The other reason presupposes that individuals must be allowed to plan their affairs with some degree of certainly unfettered by the disruptive burden of unknown potential liability after the lapse of literally decades. A 25-year period of repose is unduly long and should be shortened to 15 years. Essentially, statutes of repose should apply to products with expected long life potentials which necessarily involve predominantly capital goods.

In the event of express warranty, the provisions of the warranty should control. If a particular product is warranted for 50 years of service without failure, then obviously, the contractual representation made by the manufacturer should govern the time period for which that manufacturer remains liable.

Question 18. If S. 44 is enacted, do you think many injured parties who could otherwise prove their case would be barred by the 25-year limitation? Do you think S. 44, as written, would leave the states free to enforce a period of limitations beginning on the date of first sale in manufacturing defect or breach of express warranty cases? Should S. 44 allow states to do this? Why or why not?

Answer. Based on my experience in defending cases, I do not believe that the 25-year period of repose would affect a significant number of injured parties. As I understand S. 44, it does not affect the statute of limitations other than in the limited context written in the bill. It might be advisable to prescribe some reasonable statute of limitations parameters that would apply generally, such as prescribed by the Uniform Commercial Code for breach of implied warranties.

Question 19. Under S. 44, plaintiffs would have to prove by "clear and convincing" evidence their entitlement to punitive damages, and the amount of such damages would be fixed by the court. Do you think these changes from present practice are desirable? Why or why not? Why should punitive damages not be determined by the jury?

Answer. I am personally opposed to the imposition of punitive damages in product cases involving design and marketing defects. The entire concept of punitive damages is an outmoded doctrine and any punishment beyond compensatory damages should be left to the criminal system. This entire area is subject to much emotional rhetoric. My analysis of the reason for abolishing punitive damages in the context of product liability is detailed in an article entitled "The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel," 14 St. Mary's L.J. 351 (1983).

Question 20. Do you think S. 44 should arrest the market share theory of liability adopted in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (cert. den., 449 U.S. 912 (1980))? This case held defendants liable in proportion to their share of the market

of a defective product, even though the plaintiffs had failed to prove which particular defendant had manufactured the product that caused their injuries. Why or why not? If so, what position should it take? Why?

Answer. S. 44 probably should address the market share theory of liability of *Sindell*. The *Sindell* concept so significantly alters traditional tort law that it should not be allowed continued longevity. It basically establishes absolute liability on manufacturers simply for marketing a product. Most jurisdictions that have considered the *Sindell* approach have rejected its preachings. See *Starling v. Seaboard Coastline Railroad Co.*, 533 F.Supp. 183 (S.D. Ga. 1982); *Prelick v. Johns-Manville Corp.*, 531 F.Supp. 96 (W.D. Pa. 1982); *Ryan v. Eli Lilly & Co.*, 514 F.Supp. 1004 (D.S.C. 1981); *Gray v. United States*, 445 F.Supp. 337 (S.D. Tex. 1978); *Payton v. Abbott Laboratories*, 512 F.Supp. 1031 (D. Mass. 1981); *Morton v. Abbott Laboratories*, 538 F.Supp. 593 (M.D. Fla. 1982); *Lyons v. Premo Pharmaceutical Labs*, 406 A.2d 185 (1979).

Question 21. It has been said that the increased number of recoveries brought about by the advent of strict liability is a reason that product manufacturers and insurers want federal action. Would you comment?

Answer. Certainly the increased number and the escalating amounts of these recoveries have prompted manufacturers to seek a uniform product liability law. Manufacturers are currently subjected to the idiosyncracies of 50 different jurisdictions in an area of law that in many instances approaches the imposition of insurer status on product suppliers merely for distributing a product in interstate commerce. The entire basis for this concept of strict tort liability is socioeconomic, for example, risk distribution. This social policy and the concept of risk distribution affects not only the injured parties and the manufacturers but all innocent consumers and users. The consumers ultimately must pay either in increased cost for the products or be deprived of certain products because the marketing liability makes further distribution of a particular product economically infeasible. Since the doctrine rests on social policy which, by its very nature, affects the entire public, it appears that legislative consideration of the rules that govern this area of tort reparations necessarily must be considered by the legislative body charged with the responsibility for balancing the conflicting interests of society. Product liability is uniquely interstate commerce, and this area of tort law has a significantly greater and more direct impact on the public than any other area of tort law. It appears appropriate that the Congress, rather than the states, undertake to address this critical issue, since most product suppliers are national in scope and the state-by-state approach does not and cannot resolve the conflicting issues that swirl about this area of the law.

Question 22. The Senate report on S. 2631 contends that strict liability "is not a meaningful standard in design or formulation defect cases." Would the law and the majority of states agree with the Senate report?

Answer. I am not certain that I fully understand the nature of this inquiry. To the extent I understand the question, I believe that the judicial decisions of the various states speak for themselves. For example, the California Supreme Court in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), acknowledged that the existing standard in judging design and formulation cases was causing mass confusion and chaos in the intermediate appellate courts. As a consequence, the California court once again undertook to redefine a standard for measuring defective design. Similarly, the Texas Supreme Court in *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), rejected its earlier decision in *Hopkins v. General Motors Corp.*, 548 S.W.2d 344 (Tex. 1977), in favor of a risk vs. utility standard. The Supreme Court recognized that the bifurcated test that it earlier formulated was creating confusion and was not particularly helpful to the trier of fact in evaluating design situations. The Supreme Court of Pennsylvania in *Azzarello v. Black Brothers Co., Inc.*, 391 A.2d 1020 (Pa. 1978), apparently rejected the Restatement of Torts section 402A test and adopted a form of "guarantee of safety" test. Professor Wade who was one of the authors of section 402A of the Restatement noted the Pennsylvania standard to be "confusing and of uncertain significance." See Wade, "On Product Design Defects and Their Actionability," 33 Vand.L.Rev. 551 (1980).

Question 23. Under section 5(b) of S. 44, a product would not be unreasonably dangerous in design unless a means to eliminate the danger was within "practical technological feasibility." Is this standard consistent with the "state of the art" defense practiced in many states?

Answer. As I understand the provision stated in this question, it represents a state of the art limitation on liability. State of the art has been confused by a number of jurisdictions to mean "state of industry custom or practice" rather than "state of engineering technology and development". If a product is designed as well

as engineering principles will permit at the time it is manufactured, this should constitute a limitation on liability, irrespective of the theory of liability being pursued against the manufacturer. For example, the manufacturer of a 1950 automobile steering system should not be judged by the engineering technology of 1983 after 23 years of advances in engineering technology. Unfortunately, as the New Jersey Supreme Court held in *Beshada v. Johns-Manville Product Corporation*, 447 A.2d 539 (N.J. 1982), state of the art is no limitation and the manufacturer is liable even though a product could not have been designed or marketed differently at the time it was manufactured because of limitations in knowledge and engineering technology. Once state of the art is discarded, a form of absolute liability results.

Question 24. Section 5(c) of S. 44 provides that a product is not unreasonably dangerous in design if its dangerous aspect could not "have been eliminated without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it." There is no mention in comment "k" to Restatement section 402A that a serious impairment of economic desirability is sufficient to allow a court to deem a product incapable of having been made safer. Would the explicit inclusion of this factor in S. 44 allow manufacturers to avoid liability merely on the ground that using a safer design for the product would have resulted in a substantially higher selling price?

Answer. To the extent that I understand the focus of this inquiry, I do not believe that the language quoted "allows manufacturers to avoid liability merely on the ground that using a safer design where the product would have resulted in a substantially higher selling price." As I perceive the language quoted, it declares that the trier of fact must consider costs as merely one factor in determining whether the product was unreasonably dangerous as designed. Obviously, if a useful and needed product can only be made totally safe at a cost so exorbitant that it cannot be marketed at all, then this is a factor that the trier of fact must consider. It is a fact of life that every product ever made by the hand of man has contained some risk of harm when used under some set of circumstances. In fact, as we experience life, we are confronted daily with making decisions and electing options that involve varying degrees of risks. The entire thrust of product liability is to eliminate the "unreasonable" risk since to eliminate "all risks" is an impossibility.

Question 25. In a number of states, involuntary assumption of the risk has been eliminated from the law as a defense. Why should assumption of the risk be included in S. 44 as a defense?

Answer. Assumption of the risk as a defense had been eliminated in most states in which some form of comparative negligence or comparative fault has been adopted. Assumption of the risk, like misuse, has been merged into the broader concept of comparative fault. All fault of the user of a product should be evaluated and considered by the trier of fact to apportion or allocate responsibility for the accident and resulting injuries. I would certainly concur that assumption of the risk, as a defense independent of comparative fault, should be rejected. In fact, in the article "Assumption of the Risk and Misuse in Strict Tort Liability—A Prelude to Comparative Fault," 11 T. Tech. L. Rev. 729 (1980), I have strongly urged the abolition of the harsh "all or nothing" concept of assumption of the risk in favor of a comparative fault approach.

Question 26. How does an increase in the standard of proof from strict liability to negligence create incentives for improved product safety?

Answer. The standard of proof is a nonsequitur with the concept of improved product safety. Standard of proof addresses the very critical issue of the evidentiary basis to support a claim against the manufacturer of a product. A significant part of the current problem in product liability has been the absence of probative evidence to support the finding of a defective product. Many attorneys with whom I have discussed this problem over the years have acknowledged that perhaps the most significant problem in the product liability area has been the leniency toward the amount and type of evidence supporting a finding of a defective product. This provision elevates the standard of proof traditionally required in other tort actions such as negligence cases.

Question 27. If a jury finding on a question of fact constitutes a finding which is generic to the same question in different cases resulting from different events, does section 4 lead to potentially unequal treatment of different plaintiffs in the same position, and to judicial inefficiencies? For example, if a jury finds that the drug DES can cause a rare form of cancer in the daughters of women who took the drug during pregnancy, why should subsequent juries have to ignore this finding?

Answer. The most direct and concise answer to this inquiry is the in-depth and well-analyzed opinion of the Fifth Circuit in *Hardy v. Johns-Manville Sales Corpora-*

tion, 681 F.2d 334 (5th Cir. 1982). The Fifth Circuit, speaking through Justice Gee, outlines the numerous reasons why no two cases involving products of the same line encompass sufficiently identical facts that the concept of offensive collateral estoppel should be used to deny the manufacturer the right to defend against the claim of a defective product. The concept of offensive collateral estoppel was designed for the mass disaster cases such as the airplane crash in which all occupants are fatally injured or mass fires in which all occupants of a building are fatally burned. In those instances, the nature of the accident and resulting injuries are identical as to every injured or fatally injured party and, therefore, one fair determination of the critical issues should be binding. The same reasoning is not applicable to products involved in different events that occur under totally different circumstances and at different points in time and use. Neither the DES nor the asbestosis cases mirror the situation that exists in the mass disaster such as airplane crashes, building fires, and train collisions. To paraphrase the Fifth Circuit's decision in *Hardy*, "To do otherwise (apply offensive collateral estoppel to asbestos cases) would be to elevate judicial expedience over considerations of justice and fair play." *Id.* at 348.

QUESTIONS OF SENATOR HEFLIN AND THE ANSWERS THERETO

Question 1. In 1981, we passed the Risk Retention Act in order to decrease insurance costs. I recognize that there are many aspect of the product liability issue, but shouldn't we allow the Risk Reention Act to work before undertaking as drastic a measure as the preemption of state tort law? Do you have any information about the effect the Risk Retention Act has had so far? Could you provide us with such information?

Answer. Unfortunately Senator Heflin, my knowledge of the Act is limited by the fact that I am only a trial lawyer engaged in the defense of product liability suits instituted against numerous national and regional manufacturers and suppliers of products. Consequently, I cannot speak with any definitive authority on the purported effect of the Risk Retention Act in decreasing the insurance costs essential to provide coverage for the increasing number of large judgments and settlements engendered by product liability lawsuits. Speaking only from the personal experience of representing and knowing the situation of various product suppliers, I do know that the current liberal expansion and application of strict tort liability enumerated in Sec. 402A and the unlimited ceiling on both compensatory and punitive damages has had a direct and significant deleterious economic effect on industry and business. Perhaps the Risk Retention Act may have had the effect of preventing the existing serious economic problems generated by strict tort liability from escalating into an even more severe crisis.

Question 2. In 1977, the Interagency Task Force (which Mr. Schwartz chaired) identified three causes of the product liability problem: subjective ratemaking practices by insurance companies, uncertainties in the tort system, and unsafe manufacturing practices. What aspects of the bill will remedy the problem of manufacturers not producing safe products? Does the bill increase or lessen the incentives placed upon manufacturers to produce safe products? Can we reasonably expect an increase or decrease in the number of product-related injuries?

Answer. Manufacturers have been under the threat of producing as safe products as possible for the most economical price achievable by a tort system that pre-existed adoption of strict tort liability as formulated by the authors of the Restatement (Second) of Tort, § 402A (1965), and by the traditional American competition precipitated by the marketplace. Strict tort liability, as it has evolved, has not increased safety to any noticeable degree. Manufacturers who placed into the stream of commerce defective and badly made products have always been subject to liability for damages based on common-law negligence and breach of implied warranty. The effect of strict tort liability, as currently applied in many jurisdictions, has had the effect of imposing on the manufacturer and/or supplier a form of liability approaching an insurer status against any injury occurring during the use of a product. Strict tort liability has had the effect, however, in forcing manufacturers to install many unwarranted backup safety systems on every product to avoid potential liability. The cost of these prophylactic measures has caused the costs of products to escalate beyond the ability of many average American consumers to purchase the product. Additionally, manufacture of products that have been relatively cheap and that possess significant utility to the consuming public has been discontinued and many of these products no longer are available to the public because of the threat of strict tort liability and resulting huge jury verdicts.

In my opinion, the bill does not decrease the manufacturer's incentive to manufacture safe products. A manufacturer will remain liable for a badly manufactured product under a Federal Uniform Product Liability Act. The Bill has the salutary effect of providing manufacturers with noticeably more definitive guidelines for evaluating the design and manufacturing sufficiency of their products. The Bill unquestionably will provide increased incentive for manufacturers to resume their traditional American role of pioneering new advancements, developments, and sophisticated products which the current law totally frustrates. Strict tort liability as developed on a state-by-state bases has discouraged the manufacturer from attempting to develop and market new and different products.

I sincerely doubt any increase in the number of product-related injuries as a result of the Uniform Federal Product Liability Act. In all likelihood, the number of product-related injuries—defined as injuries that occur when a product is being used—will not be alleviated by the Uniform Product Liability Act. It is my understanding from statistics that most "product-related accidents" are not caused by defective products as much as they are caused by the substandard conduct of the user of the product. It seems to me important to distinguish between product-related and product-caused accidents. The Uniform Act would address only accidents caused in fact by defective products which was the original intent of the academicians who formulated Restatement (Second) of Torts, § 402A (1965).

Question 3. It seems to me that the bill will require the state courts to interpret terms and apply legal standards with which they may be unfamiliar. Many states appear to have well-settled laws which the bill may very well unsettle. Will the bill actually achieve uniformity?

Answer. I believe the bill will achieve uniformity. The bill provides standards that will apply in every jurisdiction and defines the parameter of application of those standards.

The suggestion made that many states appear to have well-settled laws in the product liability field does not comport with my perception. As an example, the most populous states which have been the most vigorous in developing and applying strict tort liability such as California, Texas, New Jersey, Pennsylvania, Ohio and Oregon, in my opinion, illustrate just the opposite. In each of these states, the courts have undertaken to define the standard for determining whether a product is defectively designed or defectively marketed (warning or directions for use). After initially defining the standards to be utilized by the trial courts, the Supreme Courts of the respective states have either modified or repudiated their earlier definitions of these standards because of the chaos and confusion created for both by the bench and bar. In each instance, the Supreme Court of these states [*California Barker v. Lull Engineering Co.*, 143 Cal. Rptr. 225, 573 P.2d 443 (1978); *Texas v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979); *New Jersey Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Pennsylvania Azzarello v. Black Bros. Inc.*, 480 Pa. 547, 391 A.2d 1020 (1979); *Oregon Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978)] has reformulated the standards in a fashion totally different from the Restatement. Despite the reformulations, many jurisdictions continue to experience problems. See, Henderson, *Renewed Judicial Controversy Over Defective Product Design; Toward The Preservation of an Emerging Consensus*, 63 Minn. L. Rev. 773, 779 (1979).

Another example involves the unreasonably dangerous requirement prescribed by Restatement (Second) of Torts, § 402A (1965). Many states, after adopting the Restatement of Torts, have expressly rejected the unreasonably dangerous requirement. *Cronin v. J.B.E. Olson Corp.*, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972); *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. Super 1973); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978). Yet, other jurisdictions vacillate on the intent and meaning of unreasonably dangerous concept. As noted by Professor Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 649 (1980): "Liability for conscious design defects is tortious liability, and the time has come for courts to stop creating obfuscatory tests and that can only confuse jurors and deny litigants a consistently fair and just result. Imposing a negligence standard for design defect liability is in many cases only to define in a coherent fashion what litigants are in fact arguing or what jurors are, in essence, analyzing. When this is not the case, it should in all fairness be the case. The confused and inconsistent body of product liability case law that has emerged in the last fifteen years seriously undermines the integrity of the tort system."

I believe that the Bill will establish a uniformity that will provide greater predictability and certainty to manufacturers and suppliers of products. Under a uniform bill, a manufacturer of a product in the State of Washington can expect to be judged

by the same standards irrespective of the fact that the lawsuit may be instituted in Texas, Pennsylvania, California, New Jersey, or Michigan. Similarly a manufacturer of a product in Alabama can expect the same standards for evaluation to apply whether the product which is introduced into the stream of interstate commerce is involved in an injury-producing event and resulting lawsuit in Washington, California, Oregon, Texas, New Jersey, Ohio or Pennsylvania. It is of little comfort to a national manufacturer when its own resident state provides a balanced approach to product liability law if the majority of sister states each apply totally different and contradictory rules governing the liability of a manufacturer for the identically designed and marketed product.

Question 4. I am unaware of any act of Congress that establishes federal tort standards which are enforceable exclusively in the state courts. I know that the Federal Employees Liability Act preempts state tort law but that act creates concurrent federal and state jurisdiction. Also, until two years ago, there was no federal question of jurisdiction for cases involving less than \$10,000, but that jurisdictional statute did not involve the preemption of a specific area of law traditionally left to the states. Are you aware of any statutes which preempt state tort law but which refuse to allow the federally-created standards to be enforceable concurrently in federal courts?

Answer. I am unaware of any specific federal act that preempts state law and, concomitantly, precludes federal court jurisdiction. One effect of this provision, however, will be to preclude further overburdening of an already overcrowded federal court docket.

Senator KASTEN. Mr. Sales, thank you very much.

The next witness is Mr. David Greenberg, legislative director, Consumer Federation of America. Mr. Greenberg.

Mr. GREENBERG. Thank you, Mr. Kasten.

The interests of CFA's 200 organizations and their 30 million members in product liability is strong. We have followed this issue closely ever since the mid-seventies. That means we have been with you through staff drafts 1, 2, 3, and 4, S. 2631, and now S. 44.

We salute the openness you have shown on this issue and your willingness to have your staff listen to and work with consumer groups. We also recognize the changes you have accepted in the bill. Many offensive provisions have been dropped along the way, including compliance with Government standards, the Sidell override, the limitations on expert testimony, and the leaky package problem.

But as you know, we still oppose the bill vigorously and I want to explain why. Before I do, though, a couple of quick comments about what our interests are and what they are not.

We are interested in victims' ability to recover for their injuries. We are not interested in the welfare of any group of lawyers. We are all lawyers on this panel. But I have to say that as far as CFA's members are concerned lawyers are the people who make you take a firmer grip on your wallet. Our members all know about high legal bills, and they do not want to do anything to make them higher.

While we are interested in strong standards to protect consumers and workers, we have no desire to punish industry or tie business up in massive litigation and insurance disputes. We know that ultimately we pay the bill for product liability costs, so we seek a system that promotes safety first and foremost, for we see accident prevention as less costly, more sensible, and simply more just than distributing costs after the fact.

With these goals in mind, let me turn to the present standards of liability for warning and design and compare them to those in S. 44.

It is true, the States do use a variety of tests. They have different names and use different words. But with a few exceptions, they are directed at the same purpose: to allow recovery when people are harmed by unreasonably dangerous products.

Whether the test is the section 402A test, the consumer expectations' test, the risk-utility test, or the imputed knowledge test, the focus is the same: the dangerous condition of the product, not the conduct of the manufacturer, which is often difficult if not impossible to impugn in these cases.

These tests are much more alike than they are different, and I am not persuaded that their facial differences produce different results when applied to similar facts. What I am persuaded of is this: Despite the fact that the majority of the States use tests labeled strict liability, the actual standard used is far from open-ended liability.

Both sides are guilty of overstatements on this issue, but I do think it's fair to say this. Even industry commentators recognize that the strict liability test in application differs only in a few respects from negligence. The very words "unreasonably dangerous" point to something seriously wrong in the product, and such serious wrong rarely occurs without wrongful conduct.

In reviewing the major strict liability design cases, experts from Sheila Birnbaum to John Wade to trial lawyer Harry Philo acknowledge that plaintiffs' strategy and actual evidence differs little from negligence cases. Even the most extreme case accused of applying absolute liability, the *Beshada* case from New Jersey, apparently contained sufficient evidence of wrongdoing to support a negligence recovery.

The one critical factor that separates State strict liability theories from the basic test created by S. 44 is that the States currently protect the victims from being forced to offer proof about the state of mind and manner of conduct of manufacturers in complex design and warning cases. Instead, much of current law allows dangerous products to stand as surrogates for dangerous conduct.

We believe this protection is necessary now and will be more necessary in the future. Each day we learn more about the results of long-term exposure to hazardous chemicals and the unintended side effects of potent drugs. What happens in the future when these unknown and unknowable defects emerge and injure hundreds of thousands of people?

My reading of S. 44 gives the following answer: When a product contains a dangerous defect that could not have been discovered, there can be no liability no matter how dangerous the product, no matter how severe the injury, no matter how great the total cost to society in lost lives, lost wages, and lost productivity.

Let me restate this issue in the simplest terms possible. Between an innocent manufacturer and an innocent victim, S. 44 chooses the manufacturer and says no liability. Yet of the two parties, only one could have prevented the injury through more research and development—the manufacturer. And of the two parties, only one could have insured against the injury through liability insurance—the manufacturer.

Yet the manufacturer does not bear the loss. It does not even share the loss. The victims pay the entire cost. We believe this approach is neither balanced nor economically efficient.

In closing, let me say that we recognize that the States have struggled in this area. It is new law, as Mr. Sales has pointed out, and it is a struggle to bring product liability law into sync with new products. We would have struggled under a statutory system as well. But what we should not do and what S. 44 does do is create a risk that thousands of injured consumers and workers could be left without viable product liability claims.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, ON BEHALF OF
CONSUMER FEDERATION OF AMERICA

Mr. Chairman and members of the Committee. I am David Greenberg, Legislative Director of Consumer Federation of America (CFA), a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organization which together represent more than 35 million people.

Our interest in the issue of product liability law is strong. Our board of directors and membership has selected the product liability issue as one of CFA's three top priorities for 1983.

Perhaps in explaining the importance of this issue to our members I should make some preliminary comments about what our interests are not. First, our interest is not to fatten the pocketbook of any group of lawyers, be they defense attorneys or plaintiffs attorneys. Like others on all sides of this issue, our members want to keep their legal bills as low as possible.

Second, we have no interest in harming businesses, large or small in any way. We do not believe that product liability law should be used as a tool for punishing business, forcing excessive or unjustified costs onto business or tying business up in massive litigation and insurance disputes. We realize that, ultimately, we foot the bill for product liability costs and we hope to work to make the system an efficient and forceful tool for safety.

For, Mr. Chairman, it is safety that lies at the base of our concern. We seek a system of product liability laws that promotes safety—first and foremost. Its primary focus should be to prevent product liability accidents and the suits that flow from the accident. We take as axiomatic the notion that accident prevention is less costly, infinitely more sensible and simply more just than cost distribution after the fact. But when safety breaks down and people are injured by products, we of course do address the question of who should pay the costs inflicted by dangerous products: what is a fair result, given the parties involved; what is an efficient result, one that will minimize transactions costs; and what is the result that promotes safety, one that provides incentives to stop the next death or serious injury before it occurs.

Given these twin goals—promoting safety and equitably distributing the costs when safety breaks down—how, then, do we view the standards of liability which currently exist among the various states? And how do those standards compare with the proposed negligence test for design and warning cases that forms the core of S. 44?

First, there is no doubt that the courts use a variety of tests that contain different words and, at times, different concepts. (Although there is some doubt in my mind that the tests really produce different results when they are applied to similar facts.) But, with the exception of a few states that apply negligence theory straightforwardly in design and warning cases, see; e.g., *Volkswagen of America v. Young*, 272 Md. 201, 321 A.2d 737 (1974), all the following tests are essentially strict liability tests:

1. *The Restatement Second of Torts Section 402 A Test*, which imposes liability for injuries that are caused by a product "in a defective condition unreasonably dangerous." If the plaintiff meets this burden of proof, he or she has no burden of proving specific acts of negligence by the manufacturer. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W. 2d 55 (1967).

2. *The Consumer Expectations Test*, which applies Section 402A in conjunction with comments I and G, two of the seventeen comments that follow Section 402 A and are used by courts when applying the Section to specific facts. This test holds

manufacturers liable for injury-causing product defects which make products more dangerous than the ordinary consumer with ordinary knowledge of its characteristics would expect. *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970); *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975). Again, plaintiffs need prove no negligence here; the focus of inquiry remains on the dangerous quality of the product defect.

3. *The Seller-Oriented or Imputed Knowledge Test*, under which manufacturers are held liable for defective products which a reasonable seller would not have sold had it known of their harmful character. *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 491, 525 P.2d 1033, 1036 (1974). This test does not require manufacturers to know about design defects or to be negligent in failing to uncover them. Instead, the test imputes knowledge of the dangerous defect, removing a key inquiry under a negligence standard.

4. *The Risk-Utility Test*, which holds manufacturers responsible for injuries caused by a foreseeable use or misuse of the product, if the trier of fact finds that a reasonably prudent product manufacturer would not have placed such a product into commerce after considering its hazards and utility as well as the ease of adopting an alternative safer design. *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 386 A.2d 816 (1978); *Micalle v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E. 2d 571 (1976). While the risk-utility test balances a variety of factors in determining liability—such as the usefulness of the product, the cost and availability of an alternative and the likelihood and seriousness of injury—it does not require an explicit consideration of whether the defendant acted negligently. Like the other tests, it allows courts and juries to focus attention on the condition of the product.

5. *The California Hybrid Test*, under which a manufacturer may be held liable for a design defect found inadequate using a consumer expectations test or a modified, burden-shifting risk-utility analysis. The latter alternative imposes liability when manufacturers cannot prove that a challenged design's benefits do not outweigh its risk of harm. *Barker v. Lull Engineering*, 20 Cal. 3d 412, 573 P.2d 443 (1978); *Caterpillar Tractor v. Beck*, 595 P.2d 871 (Alaska 1979). The *Barker* court shifted the burden of proof to manufacturers in recognition of the inherent disadvantage plaintiffs face in obtaining information in complicated design cases; only the manufacturer, it reasoned, knows most of the relevant factors to be weighed in a risk utility analysis.

The different tests—and the concepts contained within them—obviously create some potential for confusion, as courts proceed case-by-case and push on the boundaries of product liability law in order to dispense justice. But here is where we reach a point of overwhelming importance. Any confusion that exists in the law is there for one primary reason. Stripped to its essentials that reason is: to bring product liability law into sync with the modern era of technology and the rapid change in products, courts have been forced to explore difficult and unmapped legal terrain. They have been forced to deal with products that are stronger, faster, more powerful, more effective, and longer lasting. The sometimes miraculous benefits of these modern products bring with them sometimes frightening potential to cause harm in new and unforeseen ways. Familiar tort law concepts that work so well in simple situations do not apply straightforwardly to DES, asbestos, mass airline disasters and injuries from complex workplace machinery. Confronted with these new ways of causing harm, courts have responded in the only way possible—step by step, sometimes haltingly, sometimes mistakenly, but, nevertheless in a good faith effort to balance the competing needs of manufacturers, sellers, consumers, workers, bystanders and others. It is this process of modernizing product liability law that has created problems—not the adoption of any one theory, such as strict liability, and not the fact that the law is applied case-by-case by the courts of 50 states. We believe that any system—federal or state law, common law or statutory law—would have experienced and would continue to experience problems in dealing with the explosive changes like those foisted on the courts by new kinds of product injuries.

Strict liability was a necessary product of this more complicated set of problems. It has provided an important part of the solution rather than an additional problem. Recent survey evidence compiled by the Rand Corporation's Institute for Civil Justice casts strong doubt on the proposition that evolving standards of liability are to blame for product liability problems. A portion of the Rand Study on trends in jury trials examined every product liability case tried between 1959 and 1979 in Cook County Illinois, which includes Chicago. The results are surprising, at least to those who believe that new theories of liability pose a problem for our product liability system.

First, at the time of strict liability's greatest growth, the number of product liability trials increased only slightly—from 220 in 1970-74 to 234 in 1974-79.

Second, the overall success rate for product liability plaintiffs over the twenty-year period was among the lowest of the categories surveyed. They won 38 percent of product liability cases, second lowest to malpractice (where plaintiffs won 83 percent) out of the eleven categories. Apparently, the shift in standards of liability has not made it any easier for victims to win judgments.

Third, the most recent success rate for plaintiffs actually fell, from 41 percent in 1970-74 to 40 percent in 1975-79, indicating that the acceptance of strict liability and other doctrines may be more than offset by difficulties of proving harm and avoiding defenses in complicated product cases.

This evidence tends to confirm the conclusion of the Legal Contractor hired by the Federal Government's Interagency Task Force to survey product liability law and evaluate changes. The legal study's conclusion? "No doctrine or group of doctrines, even if changed immediately," could produce a solution.

One reason that doctrinal change would not produce a solution is that current doctrine is essentially just. Despite many overreaching statements from proponents on both sides of the issue, the fact remains that the current trends in design and warning case law do not make manufacturers insurers, do not apply any notion of absolute liability, do not stray far from traditional tort law notions of fault.

First of all it is important to recall that whatever the strict liability label on Section 402A, its requirement that plaintiffs prove the existence of a defect that is "unreasonably dangerous" means that something with the product is seriously wrong. Serious wrong does not happen in many cases without wrongful conduct at some point—if we can use the term wrongful to encompass mistakes in judgment and lapses in the application of engineering or design theory to specific product problems. Thus, the core theory behind strict liability preserves the notion that negligence is present—but it simply does not require plaintiffs to prove it explicitly.

Second, moving beyond theory, respected commentators from Professor Wade to Professor Birnbaum to Trial Lawyer Harry Philo recognize that, in practice, strict liability cases resemble negligence cases in many respects. Whether plaintiffs have to meet a standard of unreasonably dangerous or use a risk utility analysis that balances risk harm of and seriousness of injury against the costs and benefits of an alternative design, their approach, quantum and type of proof and basic litigation strategy differ little from what they would employ in a negligence case.

This conclusion also emerges from a review of many of the cases that are accused of applying absolute liability. The leading case from California, *Barker v. Lull*, eschewed the notion of absolute liability and asked only that manufacturers be held liable for failing to prevent "excessive preventable dangers." 573 P.2d at 454 (Cal. 1978). And to those who believe that *Barker* went too far by eliminating the adverb "unreasonably" from the standard "unreasonably dangerous" and by shifting the burden of proof to defendants, Professor Wade has pointed out that the courts of California and other states have subsequently "nudged it back to a somewhat more central position . . ." Wade, "On Product Design Defects and Their Actionability," 33 *Vanderbilt Law Review* 551, 566 (1980).

An equally important point must be made about the recent *Beshada* case on asbestos exposure, another case attacked as applying absolute liability. Nearly all who have read *Beshada* indicate that the New Jersey Supreme Court went further in a doctrinal direction than necessary, since the facts of the case would have supported a recovery based on negligence theory. To the extent that other courts attempt to use *Beshada* as precedent without facts which show clear wrongdoing, it is unlikely that they will get very far.

The general point should be clear. Strict liability design and warning cases—as they are applied—do not stray far from concepts of negligence and wrongful conduct. But what these major trends in strict liability cases do provide is protection that victims will not have to prove knowledge explicitly because such proof is often difficult or impossible. Instead, the cases allow for the dangerous product to stand as a surrogate for dangerous conduct when necessary.

We believe that this protection is necessary right now and that it will be increasingly necessary in the future. Each day we learn more and more about the hazardous results of long-term exposure to chemicals in the workplace. Each day we learn more and more about the unknown and unintended side effects of potent drugs. Each day we learn more and more about the unforeseeable consequences of what we genuinely believed at the time were competent designs of everything from industrial machinery to automobiles to upholstered furniture. What happens in the future, when the unknown and the unknowable produces massive injuries to workers, to women, to children?

When all is said and done, under S. 44, victims would bear all the costs of these dangerous product failures. We believe such a result is unjust, uneconomic and unbalanced.

The proponents and drafters of S. 44 have spoken a great deal about its fairness and balance. But on this issue—the most important issue in the legislation—that balance is absent. What S. 44 says is this: when a product contains an unreasonably dangerous design or warning defect which could not have been known or discovered, there can be no liability, no matter how dangerous the product, no matter how severe the injury, no matter how great the total costs to society in lost lives, lost wages, and lost productivity.

Let me restate this problem in the simplest terms possible. Assume there are only two parties in a product liability case, the manufacturer and the injured person. The manufacturer places a product on the market that, despite the manufacturer's reasonable conduct, causes serious injury. We could say that the manufacturer is innocent in the sense that it has not been negligent or wrongful in any of its actions.

Certainly we can make the same statement about the injured person—he or she bought a product in good faith, used it properly and was injured. So, in a very real sense, we have two innocent parties. Yet, under the negligence standard of S. 44, only one of those parties—the victim—bears the entire cost of the dangerous product. CFA believes that that approach is far from balanced.

We also believe that approach is far from economic. Of the two parties, only one could have prevented the injury by undertaking more research and development—the manufacturer. And of the two parties, only one is able to purchase liability insurance to help defray the costs of product injury—the manufacturer. But liability is not imposed on this party. The costs of injury are not even shared by this party. Instead, the party without any ability to prevent or insure against injury bears the entire loss.

It is difficult for us to see how this approach promotes safety, economic efficiency or fairness. There is much more to be said about the specific concepts that form the negligence standard in S. 44—for example, "practical technological feasibility" and "knowledge reasonably accepted in the scientific, technical or medical community"—and the large burdens of proof it imposes on plaintiffs. But these issues are overwhelmed by the dangerous gap created by the general negligence standard. We believe it could leave thousands of consumers and workers by dangerous products without viable product liability claims. That result is simply not acceptable.

CFA thanks the Committee for the opportunity to testify.

Senator KASTEN. Thank you, Mr. Greenberg, very much.

I would like to explore a little bit about what this bill is and what it is not. Specifically, there have been a couple of comments in some published materials which I believe have misled the general public in terms of what this bill is and what it is not. On all of these questions, I would like to give all of you an opportunity to respond, but let us just begin with Mr. Schwartz.

Is it true that S. 44 would prohibit—I am going to quote from something written recently—"prohibit victims of defective products from recovering damages from a manufacturer unless they can prove the manufacturer knew the product was defective"?

Mr. SCHWARTZ. No, that is not true. The bill requires that the plaintiff show that the manufacturer knew or should have known of the risk. If information was available that could be discovered by a prudent person and this was ignored or not found, liability would be imposed on the manufacturer, the same way it would be imposed on an engineer or a doctor or a lawyer.

Senator KASTEN. The point we are trying to get at, then, is that the test is one of negligent behavior by the manufacturer and actual knowledge of the defect by the manufacturer would be sufficient for liability; is that correct?

Mr. SCHWARTZ. If they had actual knowledge and did not act prudently with respect to that knowledge, liability would be imposed.

Even if he did not have the knowledge, if he did not act prudently in failing to learn about dangers, liability would be imposed.

That article was very misleading in suggesting that people had to know the risk. It suggested that you could actually strive to remain ignorant of the risk and then when an accident happened you would have a defense. That is absolutely untrue under this bill.

Senator KASTEN. Mr. Sales, would you also comment, the manufacturer may also be liable under sections 5(b) and 6 if they should have known about the danger?

Mr. SALES. Well, Mr. Chairman, as far as the "known" or "should have known," that, as I understand the interpretation of the bill, does not apply to the product if it is flawed, that is, it does not meet the blueprint specifications. There is liability. There is no problem because the product has failed. The actual failure of brakes, the hair lotion that becomes separated into constituent elements and causes hair loss, or whatever. The "known" or "should have known" deals with design and warning issues.

I submit that negligence—did the manufacturer exercise reasonable care in the selecting the design options then available—is the test. The "known" or "should have known" deals only with a different aspect of that, that is, the state of the art. At the time the product was designed as a blueprint and was put into the manufacturing process, was there then available engineering knowledge, technical know-how, or feasibility to have designed it better and safer with a different or alternative design that would have averted the injury?

Under Beshada of New Jersey and Azzarello of Pennsylvania, it matters not that a 1940 automobile, if it is the subject of a lawsuit today, will be judged by the standards of engineering knowledge available in 1983. To me that is absurd.

Senator KASTEN. Professor, I will let you respond to the same question, but that is one of the great concerns of the committee, that the 1980 product is being used as evidence in the 1940 product when the effect of that is from the point of view of a number of us that we are discouraging product innovation, development, and safety, because people have worried that all of a sudden they will be producing something that will be used as evidence against them, and we say, gee, it could have been this way all along.

Could you respond specifically to the question having to do with fault here?

Mr. KEETON. The difference between the bill and strict liability, as it now is, is the difference between foreseeable danger and danger that is not foreseeable. Under the bill, the manufacturer would not have been liable no matter how defective the product was, however bad it was, however many people it harmed, unless under the state of the art the manufacturer could have perceived the danger; whereas under the law as it is in most States, if the product is defectively dangerous and causes more harm than it does good, it is irrelevant, that he did not perceive that harm under the state of the art.

It has nothing to do with new developments in the state of the art. It has to do with the fact that the product was bad. The harm, in fact, although not perceived, outweighs the danger. Now, we can debate that subject, but that is an essential difference. The product

was bad in the sense that the harm outweighed the danger, although it was not foreseen that a carburetor made out of aluminum caused a lot of accidents, it did in fact cause accidents and the component proved to be a bad one.

It may be that the manufacturer could not have perceived the danger under the state of the art, but the fact is that the danger was there and it outweighed all the benefit. And the manufacturer had the technological ability to do a better job. He just did not perceive the danger. It was just a bad job.

Now, we can debate that question, but the point is that the product was bad, and who should bear the cost of those who are victimized by a product that was obviously bad? There are drugs every day or every month or year that are withdrawn from the market because they are proved to have been bad. Now, what is to happen to those who are victimized? Who should bear the cost? That is the debate.

Senator KASTEN. Are you suggesting a no-fault system, then?

Mr. KEETON. No, I am not suggesting a no-fault system. I am suggesting a system pursuant to which those who make bad products should pay for the cost of accidents resulting from those bad products. I am not suggesting that just because the defendant manufactured a product involving a risk that it should be liable. I am suggesting that if they made a bad product in the sense that the harm outweighed all the benefits, they should be subject to liability.

Senator KASTEN. I understand.

Mr. KEETON. That is the theory, that it should be the cost of doing business. Now, we can debate that. We can debate that at length, but that is the basis for it, and that is a kind of no-fault system that is far from absolute liability that Mr. Sales would characterize it as.

Senator KASTEN. I am under a disability, because not only did I not have you as a professor, I am not a lawyer, but it seems to me we are getting pretty close to no-fault. You would agree, then, that regarding the statement that I read, you would say the statement is incorrect as to the proof the manufacturer knew? I would like Mr. Greenberg to respond to this question as well.

Mr. GREENBERG. Well, it is clear that the standard in the bill is "knew" "or should have known." It is possible that the knowledge that was referred to in that article was not the knowledge of the individual company but the knowledge of the entire industry. To the extent something is unknown by an entire industry, I am not sure that interpretation is wrong, but let me follow up on Dean Keeton just a minute.

You have a choice in this area. The current standard is "unreasonably dangerous." The last time Dean Wayne wrote on this, he said, the courts are moving the more extreme cases back toward a central position. His words were about *Barker v. Lull*, which is the most extreme California case. He said it is being nudged back to a more central position.

You essentially have a choice. You have a choice between someone who puts an extremely dangerous product on the marketplace who may be innocent. You have a choice between that and the innocent purchaser. Now, I am tremendously sympathetic to the manufacturer who could not have known about a defect which cre-

ates an unreasonably dangerous product. It is just that I am more sympathetic to the hundreds or thousands of people who might be injured by that defect. They could not have done anything about it. But the manufacturer might be able to do more than what is "reasonable"; there are situations in life where we ought to ask that people do more than what is reasonable. In this case, we ought to ask that where dangerous products are of concern, manufacturers should be held to a standard of more than reasonable.

Senator KASTEN. Senator Hefflin.

Senator HEFLIN. Well, we see, I suppose, the beginning of the last leg of States rights. I think I have seen the erosion of States rights, Federal preemption that has taken place, and now I think the foot is in the door for Federal torts law, and the deprivation of the rights of the States to be able to, well, do anything under the federalism concept.

I am really surprised that the proponents of federalism that we have heard about are now beginning to erode it further.

With that as a statement, I want to ask some questions. Does this bill provide for uniform recovery of damages?

Mr. SCHWARTZ. It does not address the damage issue of how much somebody should recover.

Senator HEFLIN. Well, that is for a trial to determine. You are trying to say that the bill creates uniformity, and uniformity affects money, and the key to that is damages. Is there anything in the bill that in effect creates a uniform definition of compensatory damages?

Mr. SCHWARTZ. The definition of compensatory damages in States are uniform today. People recover loss of wages, and they recover medical costs. The diversity that exists in substantive law, where you have seven or eight different standards for design, you are trying to design a product in interstate commerce, and you cannot design a product to meet seven different requirements. It does not exist in the damage area. The laws are relatively uniform.

Senator HEFLIN. You are saying they are relative, and when money comes about, they are uniform?

Mr. SCHWARTZ. If you have a loss of wage, a loss of wage in one State is a loss of wage in another. The jury estimates how much wages a person lost as contrasted with the situation where in some States, if you improve a product and try to make it better, it is introduced against you, and in other States it is not.

Senator HEFLIN. OK, let's get into wrongful death. What does this bill do to the States Lord Campbell Act?

Mr. SCHWARTZ. This bill does not affect Lord Campbell's Act except with respect to the element of punitive damages. It would permit recovery of punitive damage in wrongful death cases. Otherwise, it does not amend or in any way change the wrongful death statutes that exist in the States.

Senator HEFLIN. Don't you have some States with wrongful death statutes that allow for pain and suffering prior to death, and some that do not? Are there not damages relative to wrongful death that vary as to the States, as to the question of who has the right of recovery, the loss to that individual?

Mr. SCHWARTZ. There is variation in the wrongful death statutes as to whether you can recover for loss of companionship. Loss from

pain and suffering is recoverable in some States, and in some States not, but that gets into the general area of tort law. Wrongful death actions apply in all tort actions. With respect to States rights, this bill makes a very limited and constitutionally supportable Federal incursion into tort law.

When you have an injury in interstate commerce with a shipment of goods and you do not think the rules apply to you with respect to those goods, this bill takes action, but it does not go further and invade the general law of damages. That decision was made by a number of prominent Democratic Representatives in the 96th Congress when they took the Uniform Product Liability Act, which did address damages in a uniform way. Those provisions were stripped out of the first Federal bills introduced by Judge Pryor in the House and others in the 96th Congress who first saw the need for uniformity in the area of substantive product liability law.

Senator HEFLIN. Have you looked at the effect this bill will have on the question of recovery of wrongful death under the Alabama statutes?

Mr. SCHWARTZ. We have looked into Alabama law. I think the only modification under Alabama law would be vis-a-vis the effect of the bill on the topic of punitive damages.

Mr. KEETON. Victor, I think you would agree with me that it would affect total recovery of a lot of victims, and also those who survive death because of the comparative responsibility defenses.

Senator HEFLIN. I want to get to that a little later on. I am just talking about the uniform damages. My analysis is that no one could recover in Alabama. There is a strong possibility that nobody could recover in Alabama for wrongful death. We have a law that allows only for punitive damages. It does not allow for any compensatory damages.

There are a series of cases that in effect have held that no compensatory damages are recoverable under a wrongful death statute. That is true in some other States.

Under the language in this bill, before you are allowed punitive damages, you must first be able to recover compensatory damages. I would suggest you look into the Alabama law and others, several other States laws, and look into the uniformity of damages in this.

Now, let me go into some other areas. Does this enlarge or decrease issues from which torts from products liability and recoveries are in areas which have been previously preempted for the Federal Government?

Mr. SCHWARTZ. You would have to be more specific, sir.

Senator HEFLIN. All right. Well, I am trying to say this. If the basis of your cause of action originates from a Federal law, does this enlarge or decrease, depending on the various States, it can in effect enlarge or decrease the cause of action, the liability, depending on the individual Federal law that might be involved.

Mr. SCHWARTZ. Well, I would have to know which Federal laws you are addressing. In general, this bill is not intended to change existing Federal legislation, such as the Black Lung Act or Federal compensation issues that are in existence. Section 3 of the bill makes clear that it is intended to preempt State, not Federal law. There is a provision dealing with subrogation liens in section 11

which would modify the current situation where the Federal Government has a subrogation right.

Senator HEFLIN. Let's take the Superfund. Have you studied the relationship of this law to the Superfund Act that was passed?

Mr. SCHWARTZ. The Superfund Act does not deal with personal injuries and general damage to property in its present state.

Senator HEFLIN. That is what I am driving at. Will this not enlarge it and create now and give a cause of action for personal injury relative to Superfund liability where it did not exist before?

Mr. SCHWARTZ. No, it does not. It was not intended to do so.

Senator HEFLIN. It may not be intended to do so, but under the language, does that not have that possibility, that a State in its supreme court decisions can interpret it to enlarge it? You are dealing with 50 States and 12 Federal appellate courts, maybe the U.S. Supreme Court, maybe another. There are more than 16, anyway. And the interpretations that they are giving is a specific language that it prohibits the enlargement of causes of action that could come from Federal law pertaining to certain districts.

Mr. SCHWARTZ. I think there is law that addresses that, Senator, but that is something during the course of these hearings that can be made absolutely explicit. The Superfund, first of all, does not deal with product liability. It deals with the disposal of harms caused by hazardous wastes, which is not product liability law in general.

Senator HEFLIN. Do you mean to tell me that hazardous chemical products are not covered in this bill?

Mr. SCHWARTZ. They are when they are used as a product, but when it is a hazardous waste addressed by the Superfund, you are dealing with the disposition of a product, and that is an activity in tort law. As you know, when you were a Supreme Court judge dealing with an abnormally dangerous activity, it is not an area decided under product liability law but the basic point—

Senator HEFLIN. Do you mean to tell me that a chemical that one company buys, and it might be released, does not come within the purview of the statute?

Mr. SCHWARTZ. The statute deals with a sale of a product and the marketing of products. It does not deal with the disposition and disposal of hazardous waste. Again, I think the definition of "product" makes that clear.

Senator HEFLIN. If you dispose of a hazardous waste, but under it you fail to give proper instructions, could you not bring a suit under your statutes here relative to Superfund disposals and things of this sort?

Mr. SCHWARTZ. The bill is not intended and does not modify, as section 3, I think, makes clear, the Superfund Act. I think that this is something that can be made crystal clear, although I think right now section 3 does.

Senator HEFLIN. I believe you need to do a little further study than that. Now, let's go to the Fungicide Insecticide Act.

Mr. SCHWARTZ. And the Rhodenticide.

Senator HEFLIN. Have you studied the effects of this?

Mr. SCHWARTZ. Yes, I have. The act in section 3, I think, clearly demonstrates it is not intended to preempt or change any Federal law. It deals with State product liability law, and that is it.

Senator HEFLIN. It doesn't deal with any kind of cause of action that you could have had if you had it under the Fungicide Insecticide Rhodendicide, whatever it is? It wouldn't affect that?

Mr. SCHWARTZ. No.

Senator KASTEN. I might say this is a question that came up when this bill was last analyzed by the Justice Department and by the cabinet council. If there are additional ways that we can make clear the intent, we would be happy to work with you. We would all be happy to try to work with you. This area you are talking about was a concern, and we tried to fence it out.

Mr. Sales, you have been sitting there frustrated, trying to get a word in. Did you want to say something in response to Judge Hefflin's question?

Mr. SALES. The only thing that bothers me about the Senator's question is, I guess there is no one that believes in leaving to the States that which is their prerogative—I am a firm, staunch supporter of that concept. If anyone is, I am. I am from the State of Texas, Senator.

Senator HEFLIN. Except when you want that secure.

Mr. SALES. Let me say, when we are talking about automobile accidents that occur within the State of Texas or the State of Alabama, or we are talking about medical malpractice or professional malpractice, or we are talking about premises' liability, or any of these tort doctrines, these matters clearly fall within the States' prerogative, and the States should have the right to lay down any rule of law it wants applied to its citizens, either by court decision or by legislative action. This applies to damage limitation or damage expansion that the State wants. The people involved, the activity that caused the accident, and the injuries sustained all are within the geographical boundaries of the State. That is particularly and uniquely a State prerogative.

The reason I am concerned about the product area is I defend products, and I have seen firsthand what is happening. When talking about products, you are basically addressing the issue of interstate commerce. We are talking about national manufacturers distributing products throughout the entire country.

The manufacturer is confronted with liabilities which vary from State border to State border with no guideline by which they can abide to manufacture a safe product. Just give a clear standard to follow and know that when that product is marketed at point A, and it travels into all the various States, the States will all recognize it as being a State product. We are talking about a matter uniquely interstate commerce here, which is different from all the other tort concepts that have been involved.

Senator HEFLIN. Let us take commerce and judicial opinion. There have been people who want Federal cures that have been able to make distinctions upon distinctions, and that has been historically true. They can broaden it and make some other distinction as to this.

Let me pursue another question with you. Have you studied the effect of this law upon treaties?

Mr. SCHWARTZ. I think there was a review by the Cabinet Council on Commerce and Trade, and the Justice Department studied the effect of this law on all other Federal laws. The treaty would be

a Federal law, so they considered that. And they did not find that the language in the bill affected treaties.

Senator HEFLIN. All right. The Senate recently debated the Montreal Protocols. They would abolish the cause of action for reckless disregard, for wantonness, or wilfull misconduct. It does not allow for that. Under this act, if an airplane is sold to a foreign country, an American-made airplane, will it not have the effect of modifying, for example, the Montreal Protocols?

Mr. SCHWARTZ. To the extent we recognize the treaty, the treaty is going to govern where it intersects with this act.

Senator HEFLIN. In other words, the act of Congress expressing it cannot have any modification upon the treaty?

Mr. SCHWARTZ. The treaty would govern if there is intersection with this act.

Senator HEFLIN. Even in a later expression by Congress?

Mr. SCHWARTZ. A number of the points you are raising, Senator, are ones that have been looked at. However, as you know very well with respect to language, it is special craft, and a lot of people have worked on this, and to the extent that you and your staff can help assure that this product liability bill does not change the Superfund, does not change the treaties we have with foreign countries or any other Federal laws, I am sure everyone in this room who supports the bill would welcome your judicial expertise in improving it.

The point I would like to respond to, because you raised the interstate commerce point, is whether the States legislatures can handle product liability laws. I have attended at 15 different State hearings on the product liability laws and this is what occurs. Some people say they want a State product liability law, but opponents make a very strong argument. They say if we enact a product liability law in Alabama, this will provide no benefits to businesses in Alabama. Over 70 percent of the goods are shipped out of Alabama.

All a State law will do is restrict the rights of citizens in Alabama to recover without providing one whit of benefit to small businesses in Alabama who want to know what their responsibilities are. That is why this is a unique situation and is one that is honeycombed with interstate commerce and is different from any other area of tort law.

Senator HEFLIN. All right. Then let me ask you, on OSHA, OSHA does not necessarily create a civil cause of action. Is there going to be any effect on creating and enlarging the axiom under the general broad terms as included in your bill with OSHA standards?

Mr. SCHWARTZ. Well, in the bi'll that was approved by the committee last year and is now S. 44, section 3 does not preempt OSHA or any other Federal laws.

It does not create a new cause of action under the OSHA law. If that is not clear enough, I think that all of us have to work on language to make it clear. It is not intended to do that. I think section 3 is relatively clear on that.

Senator HEFLIN. Let us go to an area of rights of individuals under Federal maritime law. We have, of course, the Jones Act. We also have the tort based on common law of seaworthiness. Many

decisions have held, for example, that stairways, winches, various other elements can come within the unseaworthiness doctrine. Strict liability is generally under the unseaworthiness concept.

What effect will this bill have on this area, and another area—FELA cases—where there are certain types, as I recall, of strict liability action such as, I believe, the Federal Client Safety Act? Also, third party practices. Even where it may be possible that the owner of the ship is the ship manufacturer. Will it have any effect relative to those remedies that have been made available to employees and in its relationship with this third party practice?

Mr. SCHWARTZ. The act is not intended to modify the FELA, the Jones Act, the Federal Longshore and Harbor Workers Act, which I think abolished the doctrine of unseaworthiness, but that is not directly relevant to your question; or any Federal cause of action that provides a right to the individual. There is a provision in section 11 which would affect the Government's subrogation lien when it proceeds against a product manufacturer. It would abolish the subrogation lien in those cases. It does not affect the rights individuals currently have under the Jones Act, FELA, or other Federal legislation.

Again, if that is not crystal clear, it is a matter that can be clarified during the course of this legislation.

Senator HEFLIN. You did not address the third party actions relative to those matters. Would that have some relevance?

Mr. SCHWARTZ. Where the current cause of action is governed by an existing Federal statute, the existing Federal statute is intended to govern, and this act does not preempt it. This act only preempts State tort law in selected areas which are defined as product liability. The core of product liability law today, actions brought against manufacturers of products or distributors.

Senator HEFLIN. Dean Keeton raised the issue of comparative risk or comparative negligence as a contributor to negligence. Do we know how many States still have contributory negligence as a bar?

Mr. SCHWARTZ. About 34 States have comparative negligence. The remaining 16 States still have contributory negligence as a bar to recovery. Of those that have comparative negligence, 22 have modified comparative negligence. The bill uses a pure comparative negligence standard, which is helpful to plaintiffs in a good number of States.

Senator HEFLIN. Well, of course, it is up to the individuals in the States largely and the legislatures of the States as to what it has been in the past, and generally accepted as to what defenses they wanted to have relative to tort liability, and, of course, this would change that.

But let us assume a hypothetical case where there is an automobile accident. Suit is brought against a driver, and a State suit is brought against the automobile manufacturer. Contributory negligence is the prevailing law in that State. The action is brought. The judge in effect can charge the jury what in effect would cause contributory negligence and would prevent recovery from the driver of the automobile.

The products liability that you would have would allow for recovery under the Comparative Responsibility Act. That would be true?

Mr. SCHWARTZ. That is true.

Mr. KEETON. Let me make a statement at this point. Let us suppose the driver's responsibility was 40 or 50 percent. I understand the plaintiff would be denied that recovery because you are abrogating entire liability of each tortfeasor and plaintiff cannot recover from the manufacturer the driver's share. Plaintiff only recovers from the manufacturer for its responsibility, which might be only 20 percent.

Mr. SCHWARTZ. Let me take the two cases.

Mr. KEETON. Let me give a hypothetical which is my main objection to this.

Senator HEFLIN. All right, sir.

Mr. KEETON. Plaintiff, let us say, is 20 percent negligent. The driver of the car is 50 percent. The manufacturer of the defective product is 30 percent responsible. Under the law as it now is, plaintiff can recover 80 percent of the damages, or, let us say, if it is \$1 million damages, he will recover \$800,000. This is true in nearly all jurisdictions, except two or three where they have gone to several liability.

The way this statute is drafted, the manufacturer's comparative responsibility is only 30 percent.

Mr. SCHWARTZ. Well, first, I think it is easier to understand. We first talked about the case—

Mr. KEETON. I am talking about this case.

Mr. SCHWARTZ [continuing]. With respect to the plaintiff's fault. If the plaintiff is more than 50 percent liable, in most of our States today, he would not recover, because they either have modified comparative fault or they have contributory negligence. When you introduce a third person or a third party, that is what you want to address under the bill. The defendant is not asked to absorb the fault or the wrongdoing of a party over whom neither the defendant nor the plaintiff had control. That does change the law in a number of States.

Mr. KEETON. Let us look at this situation. This is very important, because we have studied this a lot in Texas. We have a bill drafted to take care of this. We have one of these parties that is not liable, and yet he is negligent, and the negligence was the cause of the accident. The manufacturer was liable. He caused all the damage because the accident would not have happened but for his defective product. The plaintiff was contributorily negligent.

Now, the manufacturer is more responsible than the plaintiff, but yet the plaintiff only recovers, under the way this is drafted, 30 percent of his damages from the manufacturer, and he absorbs all the losses, that is, the so-called responsibility of the party that was negligent but not liable. That is nonsense.

Senator KASTEN. Mr. Greenberg has to testify before the House of Representatives in another committee this morning, so if you wanted to make one brief comment, or if you just wanted to leave and testify, we appreciate very much your participation. We did not realize the panel was going to take this long.

Mr. GREENBERG. Thank you.

Senator KASTEN. I would like to remind everyone that we have three more panels this morning. We have now spent a significant amount of time on this, but I think it is important that we explore

especially the Federal preemption questions that Senator Heflin is bringing forward, because we are making a record here this morning.

It is not the intention of this legislation to preempt or effect Federal law, and if there are efforts that are going to be made in further working with this area, we want to work to further clarify them, but I think we have made an important record as to what the intent of the legislation is. It is not to overturn State law.

Mr. KEETON. Senator, there is one observation, I think, about this bill that is most important. It is this part of the bill on comparative responsibility. I think it is, by far, in my opinion, the part that I disagree with the most. One of the problems with Federal preemption in the product liability area is that you are dealing with one small aspect of tort law. You cannot allocate fairly and justly the cost of accidents when you are only dealing with product liability. You have got users out there, and you have to have the same kind of defenses available to all of them. You have to have the same agencies in control of all of those responsible for an accident. That means the State supreme court.

Mr. SALES. Senator, can I make one response to the dean's comment? That is, I do not think that the State in which contributory negligence is an absolute bar this bill would permit a suit against the product supplier limiting recovery just to the percentage of fault for which the manufacturer is responsible. In this case, the hypothetical case of 30 percent is bad. I think culpability ought to be based on the percentage that someone contributed to the accident. This is the California approach formulated by the judiciary and it makes the most sense of all.

I think one of the underlying features of this entire bill and the reason for it insures that we have to protect consumers, but that we not kill business in the process. That is what is happening across the country right now. We are killing the business community. Small businesses are going out of business. The large national manufacturers have sustained terrific losses that cannot be recouped, and the shock verdicts continue.

There must be some guidelines to limit this situation.

Senator HEFLIN. Let me ask you this question. You raised this question here which involves unnecessarily high insurance costs. In July 1981, Business Insurance Magazine reported, and I quote, "Product liability insurance premiums have leveled off or plunged down during the last 3 years."

Do you agree that product liability costs have decreased recently?

Mr. SALES. Sir, I do not know the cost of premium insurance. I know the cost to the manufacturers, based on just personal representation, has gone up. I think if there had been a decrease, it has been because a number of the products that were insured and many of the small insured businesses no longer exist. They are bankrupt and out of business.

Senator HEFLIN. You are saying that all of that is due to the lawsuits?

Mr. SALES. No, sir, but I do think that is a factor.

Senator HEFLIN. I see. Now, on this question of the driver, contributory negligence, the manufacturer, comparative negligence,

have there been any decisions that have approached the unequal treatment of parties? Is that an issue under the equal protection clause issue? Is that involved relative to these different standards?

Mr. SCHWARTZ. If the question is, have there been any cases, there are no cases that I am familiar with which have held laws unconstitutional under the equal protection doctrine of the Constitution based on the fact that different liability rules are used in types of tort actions. If there were, there would be no product liability law at all, because manufacturers are held to a different standard than everyone else in society.

Senator HEFLIN. Well, that might be an interesting theory that might be pursued. It is just a theory I do not recall that has ever been pursued, but it seems to me like there may be some issues on this raised in different jurisdictions, 60 some odd jurisdictions, as to how they would hold.

Mr. KEETON. It seems to me there would be under this statute, because you are limiting the liability of the manufacturer's responsibility to negligence in the design area and at the same time a different defense structure is being created for the manufacturer than that which is available to other defendants under State law. Because a State law governs users and a Federal law would govern manufacturers, there would be an entirely different treatment of the different classes of defendants.

Senator HEFLIN. Under this bill, is there any uniform statute of limitations other than your statute of repose on capital goods?

Mr. SCHWARTZ. No, there is not. There was in an earlier version of the draft, and the statute of limitations was removed.

Senator HEFLIN. Then you are not very uniform in that aspect of it.

Mr. SCHWARTZ. That is correct. My understanding of the judgment as to why it was deleted is that this was a purely procedural part of the bill that told you when you could bring your claim. In general, the bill has only substantive rules of law, and not procedural rules.

Senator HEFLIN. Under the uniform commercial code, to get into warranties, I am not sure from reading your bill, and I really have not studied it carefully—I wish I had had time. I have just not done it yet. Does your bill abolish the concept of implied warranty as a right of recovery?

Mr. SCHWARTZ. The bill that was approved by the committee last year, now S. 44, does not contain a provision for implied warranty where there is harm caused by a product. Justice Taynor, one of the most imminent scholars in this area, called actions for implied warranty a trap for the unwary. The approach used in S. 44 was also used in the Uniform Product Liability Act, H.R. 7921 and S. 2631. They create a uniform cause of action in tort. Do not use contract or UCC doctrines such as implied warranty.

Senator HEFLIN. Then the answer to my question is, this bill abolishes implied warranty as a cause of action?

Mr. SCHWARTZ. It substitutes causes of action on strict liability for construction defects and express warranty and fault based liability in design and warnings.

Senator HEFLIN. Your uniform commercial code was an example of States moving in an area of uniformity as opposed to the Federal

cure. Generally you quoted Justice Taynor, but I suppose we could quote a good number of other justices that would indicate that the concept of implied warranty is a valid concept.

In other words, you just think everything has to be expressed.

Mr. SCHWARTZ. Well, implied warranty is a contract doctrine which had been modified and changed into a tort doctrine, which is really product liability. What Justice Taynor did was observe that what we are talking about in product liability law is not really contract. It is tort law.

Senator HEFLIN. What is express warranty?

Mr. SCHWARTZ. Express warranty terms are used in the bill because courts have clung to them. Here you are really talking about a misrepresentation about a product. The bill did use contract language there because almost every court in the United States uses it.

Senator HEFLIN. Well, almost every court in the United States also used implied warranty.

Mr. SCHWARTZ. Today most causes of action are decided either on negligence or 402A. There are a few States that still talk about the implied warranty recovery, but for the most part implied warranty as against Ford Motor Co. arising in Tennessee can be a real trap, because there is a short statute of limitations. It is only 4 or 5 years after the time of the sale. Most causes of action in product liability are pursued on their negligence or strict liability today.

One of the intents of the bill is to reduce transaction costs and clarify the law. It talks in tort law terms.

Senator HEFLIN. In 1981, the Congress passed a Risk Retention Act in order to decrease insurance costs. I recognize there are many aspects of the product liabilities that had we yet had an opportunity to determine what the result of the Risk Retention Act had been?

Mr. SCHWARTZ. Well, you really cannot ever tell what the end result of a law is, but the initial results are very, very good. Insurers have vied to be competitive with their product liability insurance rates and premiums. Last year there was not one business that testified that insurance rates were unfair as compared to hearings which were conducted in this room several years ago where many businesses pointed to oversubjective ratemaking as a cause of a problem. The Risk Retention Act seems to have ended that part of the product liability problem, leaving us to focus on the tort law.

Senator HEFLIN. Let us get to one other area, the area of subrogation. Subrogation has generally been in some States controlled by insurance contracts, insurance regulations, while some people are saying that this is product liability and it does not violate McCarran-Ferguson. Do not the provisions of this in effect modify existing policies, types of policies, other related insurance policies, the insurance law dealing on subrogation?

Mr. SCHWARTZ. It does not change existing contracts; with respect to responsibilities, it does change the law with respect to subrogation. That proposal that was developed over 6 years and studied by both the Ford and Carter administrations. It was used in the Uniform Product Liability Act; it abolishes subrogation in product liability actions and also abolishes the right of a product manufacturer to bring a contribution suit against an employer. Most spe-

cialists in business insurance have indicated that this will reduce substantially legal and transaction costs without harming any person bringing the cause of action because he does not get the subrogation action anyway. It is supposed to be a transaction cost reducer.

Senator HEFLIN. Well, relative to laws and regulations talking about insurance policies that in effect say that this is dealing with subrogation and shall be in each insurance policy which is in effect a regulation of the insurance business by the State, your bill and its applicability can modify those provisions that have come either from statutes or come from regulations, will they not?

Mr. SCHWARTZ. Well, my understanding of insurance regulations, Senator, is that insurance regulators review whether rates and premiums are fair, not excessive, and adequate. The subrogation provision of this bill does not address regulation of insurance in any of those ways. It deals with a special problem in product liability tort law. That is the relationship between the injured worker, the employer, and the product manufacturer, the so-called *Troika* case.

One of the things that comes up in those cases is allocating the responsibility between the three parties. So I would characterize it as tort law. On the other hand, some could characterize it as workers compensation. I do not think it deals with rate regulation of insurance which is the topic specifically addressed in the McCarren-Ferguson.

Senator KASTEN. Thank you. I know this has been a long series of questions, but I believe we have established what the intent of the bill is as to what we are and are not trying to do. I would like to say, Senator Heflin, we look forward to working further with your staff in clarifying further areas. And there may be additional questions submitted to members of this panel and other panels in writing, and we would hope that you could get back to us with responses to those questions.

Thank you very much, gentlemen.

The next panel includes Mr. Sevier, Mr. Jenner, Mr. Preiser, Mr. Morris and Mr. Liggio.

The first witness on this panel will be Mr. Ernest Sevier, the chairman of the section of tort and insurance practice of the American Bar Association. Mr. Sevier.

STATEMENTS OF ERNEST Y. SEVIER, CHAIRMAN, SECTION OF TORT AND INSURANCE PRACTICE, AMERICAN BAR ASSOCIATION; ALBERT E. JENNER, COUNSEL, CHICAGO, ILL.; MONTY PREISER, WEST VIRGINIA TRIAL LAWYERS ASSOCIATION; EARL F. MORRIS, FORMER PRESIDENT, AMERICAN BAR ASSOCIATION, COLUMBUS, OHIO; AND CARL D. LIGGIO, AMERICAN CORPORATE COUNSEL ASSOCIATION

Mr. SEVIER. Thank you, Mr. Chairman. My name is Ernest Sevier. I have been asked by President Harrell of the American Bar Association to appear in opposition to the Federal codification of the products liability law by your proposed legislation.

Since 1981, the ABA has opposed Federal preemptive legislation in this field. In its recently completed mid-year meeting, the house of delegates, the American Bar Association's policymaking body,

reaffirmed this position by adopting 185 to 113, a resolution "that the American Bar Association opposes enactment of broad Federal legislation that would codify the tort laws of the 50 States as they relate to products liability and opposes legislation such as S. 2631," reported in the 97th Congress, "that would attempt to do so."

The house of delegates is composed of approximately 385 elected members. Besides being the largest bar association in the world, composed of over 50 percent of the lawyers in the United States, the ABA has provided that the house of delegates is to also include representatives of State, local, and affiliated bar groups whose membership includes non-ABA members. Therefore, the vote of the house represents the broadest possible view of the legal profession in America.

By its vote, the ABA has reaffirmed its position that products liability is best left with the States. Our great legacy, the common law, can and has been supplemented by State legislation to provide a system of laws suited for the social, economic, political, and geographical needs and desires of the individual States. It is a system that also provides for changes in these needs and desires. The wisdom of the system is that it provides for stability and certainty, as well as evolutionary change.

Perhaps changes do not occur as fast and in the manner that some of us would want. However, economic expediency and satisfaction of temporary demands for drastic change by one special interest group or another are not appropriate tradeoffs for the basic values of our present system. On a personal note, although I have been a civil litigation defense attorney for over 20 years, including representation of manufacturers in products liability litigation, I strongly feel that the long-range objectives of manufacturers are best served by working within our present State law system.

Twenty-six States have enacted specific product liability legislation directed toward major concerns within those States. At least 4 more have addressed some areas of product liability and at least 12 other States within the last 2 years have considered products bills. Interestingly enough, no State has enacted the entire Federal Model Products Liability Act, which would indicate differing needs and desires as well as dissatisfaction with Federal attempts to codify local policies of the law of torts.

The house of delegates did recommend that two discrete areas of product liability law be considered as subjects for Federal legislation. The first is the area of occupational disease, such as asbestosis, where, (1) there is a long latency period and, (2) the solvency of a significant number of manufacturers is involved and, (3) where the number of claims is an excessive burden on the court system. Obviously a very special situation has arisen here. Second, there is the right of a Government contractor to seek indemnity from his Federal employer where he has not been able to provide for the risk to the claimant. This is necessarily a subject of Federal law.

Broader Federal products liability legislation would not only restrict the common law in its freedom to respond to the changing and diverse needs of the public, it would introduce the very uncertainty that it aims to avoid.

In the absence of a body of Federal case law, the State courts to which you would delegate jurisdiction under your proposed act

would by necessity turn to their own case law in applying the act's standards to a given fact situation. Widely varied interpretations would inevitably result.

Additionally, while Federal law is being applied to some State actions, State law will be applied to others, resulting in inconsistent treatment of both business and consumers in the same State. Obviously, one of the corollaries will be increased litigation.

In summary, the position of the ABA, the single association that represents the entire spectrum of the legal profession, is that the proper place for control of the broad area of products liability law is as it has been, with the States. Thank you, Senator.

[The statement follows:]

STATEMENT OF ERNEST Y. SEVIER, CHAIRMAN, SECTION OF TORT AND INSURANCE
PRACTICE ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, thank you on behalf of the American Bar Association for allowing me to present this testimony. ABA President Morris Harrell has requested that I appear to express the Association's continued opposition to broad federal legislation preempting state law in the area of products liability.

The Association's opposition dates back to February of 1981, when the ABA's policy-making body, the House of Delegates, adopted by voice vote a resolution opposing enactment of legislation "which would impose a Model Products Liability proposal as federal law."

Subsequently, with the introduction of S. 2631 in June of 1982, a resolution was submitted to the House of Delegates by the Section on Corporation, Banking and Business Law, to reverse the ABA's position and to support federal legislation. When the House of Delegates met in San Francisco in August of 1982 to consider this resolution, it voted to postpone consideration until the next meeting, scheduled for early February in New Orleans in 1983. The House of Delegates also recommended that the President appoint a Special Committee which included representatives from interested sections to study the matter and make recommendations to the House of Delegates. During the course of the debate, a motion was made that would have prevented the Association from making any representation to Congress either supporting or opposing federal products liability legislation pending consideration of the subject by the House of Delegates at its next meeting in February. The motion was defeated by a narrow margin; it nevertheless affirmed the Association's duty in the interim to continue to advocate its 1981 position to Congress.

In October of 1982, President Harrell appointed a distinguished seven-member committee chaired by Robert McKay, former Dean of New York University School of Law and current Director of the Institute of Judicial Administration. The committee included among its members nominees of the Sections of Corporation, Banking and Business, Public Contract Law, Litigation, and Tort and Insurance Practice. After extensive deliberations, the committee produced a thorough Recommendation and Report which was submitted to the House of Delegates at the New Orleans meeting. The basic tenet of this Recommendation is that the ABA remain opposed to "enactment of broad federal legislation that would codify the tort law of the 50 states as they relate to products liability, and oppose legislation such as S. 2631 * * * that would attempt to do so." The Recommendation listed four exceptions where federal legislation or federal attention should be considered.

The Special Committee's Recommendation was submitted to the House of Delegates, and after extensive debate, the House voted 185 to 113 to back the above quoted portion of the Recommendation opposing "broad federal legislation" preempting states' laws. The House then took up the four exceptions, approving two of them: support for federal legislation to address the issues of liability and damages in the area of occupational disease claims, such as asbestosis; and federal legislation "allocating products liability risks between the federal government and its contractors." See Appendix A.

The ABA's House of Delegates is composed of approximately 385 elected members representing a broad and diverse cross-section of the legal community. Operating in a manner similar to the United States Congress, it is the legislative body for the largest professional lawyers organization in the world, with membership approaching 300,000 people. Between the San Francisco meeting where the matter was de-

ferred and the New Orleans meeting where the matter was decided upon, the Special Committee's recommendation was the subject of considerable discussion by concerned members of the Bar Association. The largest single concerted lobbying effort was by members of the Association connected with the manufacturing community. Letters, telephone calls, personal contacts and telegrams were addressed to the members of the House of Delegates by house counsel for manufacturers and manufacturing trade associations opposing the basic recommendation of the Special Committee and the ABA's position opposing broad federal preemptive legislation. Despite these extensive lobbying efforts that continued to the floor of the House of Delegates at the time of the debate, the ABA's position was reaffirmed by 62 percent of the voting Delegates, a substantial victory by the standards of any legislative body.

The House of Delegates reaffirmed the wisdom of leaving the great majority of products liability case law to the various states which are in a position to best address themselves to the specific social and economic needs of their constituents. Our long evolved common law system was reaffirmed.

However, the ABA feels that the Congress should consider legislation in the two areas contained in the Special Committee's Recommendation: asbestosis, or more broadly occupational disease claims; and claims involving the relationship between the federal government and its private contractors. At the same time, other forums are considering these problems, such as the prestigious National Council of State Courts which has been and is holding meetings on possible joint state solutions to asbestosis and related occupational disease litigation. We are confident that the attention focused on products liability litigation by the recent ABA debate and hearings such as these will encourage further state legislative review of the need for change or adjustment in the existing laws.

It has been argued that the lawyers are only interested in feathering their nests. If this were the case, the legal profession by opposing enactment of federal preemptive legislation would be turning its back on a whole new area of litigation created by the uncertainty which such legislation would invoke. Constitutional challenges of the Act in whole or in part would be raised in the various state courts where jurisdiction would reside under your proposed legislation. Interpretation of various provisions of the Act would differ as state courts tailor their decisions according to the individual state's desires. Unequal results would occur when products liability litigation is combined with other fields of law with differing rules of law, for example, when a products liability claim is joined with an automobile liability claim. The proposed Act's "pure" comparative negligence rule may conflict with modified forms of comparative negligence such as the Wisconsin rule. The proposed Act's punitive damage rules may conflict with the rules in states where no punitive damages are granted. Rules will differ in the areas of set-offs, separate settlement, joinder, contribution and indemnity. Therefore, the desire for certainty will in fact be undermined by federal legislation.

Our judicial system has reached its unparalleled position of justice among the legal systems of the world by adherence to the evolutionary rules of the common law. We respectfully urge that the wisdom of these rules not be undermined, but instead be maintained by opposition to broad federal preemptive legislation in the products liability field.

Thank you.

[Appendix A]

RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, ADOPTED FEBRUARY 1983

I. *Be it resolved*, That the American Bar Association opposes enactment of broad federal legislation that would codify the tort laws of the 50 states as they relate to product liability, and opposes legislation, such as S. 2631 reported by the Senate Commerce, Science and Transportation Committee in the 97th Congress, that would attempt to do so.

II. *Further resolved*, That the American Bar Association supports federal legislation which addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: (a) there is a long latency period between exposure to the product and manifestation of the disease; (b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and (c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

III. *Further resolved*, That the American Bar Association supports enactment of federal legislation allocating product liability risks between the federal government and its contractors and providing, in certain instances, indemnity against those risks.

[The following information was subsequently received for the record:]

AMERICAN BAR ASSOCIATION,
San Francisco, Calif., June 15, 1983.

HON. ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter to me asking a series of questions in connection with my ABA testimony, before your subcommittee, on broad federal uniform product liability legislation.

Question. The ABA Study states that existing common law product liability decisions of state courts "reflect the policies and desires of widely-diverse states as to standards of proper conduct and reflect local ideas as to how best to protect their own businesses, consumers and their general public from wrongful conduct."

Do you find many judicial decisions that say, "Well, we've looked at the facts and you could go either way, but this is a rural state so we're ruling against the defendant." Or, "This is an urban state so we are ruling against a defendant." Can you direct the Committee to judicial opinions that explicitly rule on the basis of specific economic or social conditions of the state in which the claim is brought?

Answer. Judicial opinions do not contain statements such as you suggest. Principles of law under our federal system of government vary from state to state, whether one is dealing with products liability or other areas of law. Businesses and citizens understand the principles of law peculiar to their states, which have been developed over the years to reflect the political, philosophic and economic characteristics of the locality.

Question. One theme I get out of the ABA report is that the court, not the legislature, is the proper place to make product liability law. In fact, I understand that at the recent ABA meeting it was argued that value judgments have to be made on a case by case basis, and these value judgments should be made by judges. Do you believe that a judge is better suited to make these value judgments than a legislator who is elected to make value judgments in formulating public policy?

Answer. I disagree with your statement that the ABA believes that the courts, as opposed to legislative bodies are the proper forum to make products liability law. We have stated in both the ABA Special Committee report and in my testimony that state court laws in products liability evolved through court decisions, supplemented by state legislation.

The ABA Special Committee Report, to which I assume you are referring, states in applicable part:

"The Committee, however, also believes that there may be an important place for legislative enactment of the common law; but on the federal level, it must be very cautiously approached. Unlike civil law, which relies exclusively on one mode of lawmaking, our system of justice permits both common and statutory development. Dean Roscoe Pound, in defending the role of the legislature of the development of the common law, perhaps said it best when he explained that the 'imperative' (legislative) and 'traditional' (judicial) elements of common law act upon and correct each other so that 'when either, from occupying the field too long, becomes too fixed and rigid, the needed flexibility is restored to the law by its rival.'"

Question. Can you cite an example where after a federal statute codified a common law, the law was more uncertain, more unclear, more confusing than before enactment of the federal bill?

Answer. The proposed Federal Products Liability Act is unique in its attempt to codify such a broad area of common law. Therefore, we are without any valid examples to follow.

Common law has developed at the state level. Therefore, it is obvious that when years of carefully evolved common law, supplemented by state statutes, are preempted at the federal level, we will have disruptions. State courts which have exclusive jurisdiction under the proposed Act, will come up with varied interpretations. The developed hybrid will increase confusion and uncertainty and the picture will remain unclear for years, unless and until the Supreme Court, already overburdened as stated by Chief Justice Burger, resolves the matter.

Question. The March 1983 issue of the American Bar Association Journal reports that the ABA recently conducted a random poll of 528 members and 78 members of the ABA's Law Student Division. The results indicate that 491 of those polled favor

"enactment of federal product liability legislation superseding state law." Isn't this inconsistent with the position adopted by a majority of the ABA House of Delegates at the mid-winter meeting? Some have suggested that the ABA poll was confined to the Association's younger members. Isn't this incorrect?

Answer. It is not correct that the Law Poll in the March issue of the ABA Journal reported that 491 of the 606 people polled favor "enactment of federal product liability legislation superseding state law." The poll reported that 73 percent of the respondents attached great or moderate importance to the issue but that less than half of the respondents favored federal legislation in this area. The poll made no effort to determine the type or extent of federal legislation which would be supported by those favoring some federal legislation.

I have no information on the polling techniques used in the poll and cannot comment on the age distribution of the sample or on the statistical validity of a sample of 606 persons out of a profession numbering over 600,000.

The 385-member House of Delegates, which is carefully structured to represent all aspects of the Bar, carefully studied all sides of this matter before making its final decision in February of 1983. When the Section of Corporation, Banking and Business Law of the ABA submitted its proposal to the House of Delegates in August of 1982 to reverse the ABA's position opposing enactment of federal preemptive legislation and further asking the ABA to support legislation such as S. 2631, the delegates voted to defer the matter until the next meeting six months hence. The House further requested that the ABA President appoint a Special Committee to study the matter. This was done, resulting in a detailed report of over forty pages, which was submitted to all delegates in advance of the February 1983 meeting. At that time, the House of Delegates voted to approve a recommendation of the Special Committee Report, which opposed broad federal preemptive legislation, by a vote of 185 to 113 and voted to approve two recommendations providing for support of federal legislation in limited areas: occupational disease litigation such as that involving asbestosis, and allocation of liability risks between the federal government and its contractors.

Please let us know if we can provide any additional information.

Sincerely,

ERNEST Y. SEVIER,

Chairman, Section of Tort and Insurance Practice.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. Some other resolutions were considered by the American Bar Association's House of Delegates. What were these resolutions?

Answer. The ABA's Special Committee report, prepared at the request of the House of Delegates for its deliberations in February 1983 in New Orleans, made five recommendations. Three of them, which were attached to my written statement, were approved by the House. Two of these approved recommendations provided for support of federal legislation in limited areas: occupational disease litigation (such as that involving asbestosis); and allocation of liability risks between the federal government and its contractors.

There were two other exceptions provided in the Special Committee's report which were turned down by the House of Delegates: recommending federal legislation regarding actions for damages sought for harm for which an injured person is entitled to federal or state workers compensation type benefits (defeated by voice vote); and consideration at the federal level of problems inherent in punitive damages (defeated 127 to 141).

The House also had before it a report recommending ABA approval of broad federal legislation in this area, presented by two sections of the Association. These sections withdrew their report following the House debate and favorable action on the Special Committee's report.

Question. To what extent did voting delegates at the ABA New Orleans meeting have information on which to base their decision?

Answer. Each delegate was given a complete copy of the full report of the ABA's Special Committee, which had been appointed by the ABA President to study the matter after that issue was deferred for consideration from the August 1982 meeting to the February 1983 meeting of the House of Delegates. Each delegate was also given the full report of the Corporation, Banking and Business Law and Public Contract Law Sections which called for support of broad federal legislation. Additionally, each delegate was inundated with statements from representatives of the manufacturing community asking that the ABA support a broad federal products liability law.

Question. It has been alleged that the ABA delegate vote to oppose federal product liability reflects only the views of the plaintiff's bar. What is your response?

Answer. The House of Delegates voted by a substantial majority 62 percent to oppose broad federal product liability legislation. No vote breakdown is made when

such a vote is taken to indicate who voted each way but the vote strongly suggests support for the House action from many different segments of the Bar. Enclosed is a list containing a breakdown of the House of Delegates membership.

Senator Kasten. Mr. Sevier, thank you very much.

Mr. Albert E. Jenner, Jenner & Block, Chicago, Ill.

Mr. JENNER. Thank you, Mr. Chairman. I am delighted that my colleague to my right has raised the issue of the position of the American Bar Association initiated by his section, the torts and insurance law section, and stoutly supported in the debates last February at the midwinter meeting of the American Bar Association.

I want to say something about that. The relevancy here—and I want to talk about that relevancy—is the fact of my longtime membership and past presidency of the National Conference of Commissioners on Uniform State Laws, which I will point out in a moment, and also my membership since 1948 in the House of Delegates of the American Bar Association.

I appear before you to support this bill, particularly in principle. There would be some aspects as to which I would, if permitted in due time, submit a memorandum to the committee as to items which I have heard debated today. I do not intend to go into that except to say that there is no one who has appeared before this committee who has done anything but recognize that the laws of the States with respect to product liability are disparate from every one of the other 50 States, and nobody knows what the law really is nationally.

There is no national law and it is vital and necessary there be one. As was stated by one of the gentlemen who testified preceding this panel, that businesses, manufacturers, et cetera, in State A distribute their goods in States B, C, D, E, F, and G, and maybe all the other 49 States. Each time they enter a State they distribute in a State that is a part of this country. The commerce clause permits that and prevents States from entering any trade barriers to prevent businesses from merchandising their wares throughout the United States.

One of the things I want to emphasize, Mr. Chairman, to this fine committee, is that the absence of a uniform Federal product liability statute has been part of, and a factor in, the low economy of this country at the moment. Fortunately, it is beginning to come out of it, but slowly, and the existence of the absence of a uniform product liability act is still impinging upon that recovery.

Now what started this in the American Bar Association, of which I have been a member for 50 years. It was a resolution of Mr. Sevier's Tort and Insurance Section back in 1981. It came before the board of Governors—I mean, the house of delegates, late in the day and passed by voice vote. There was no debate on it whatsoever. It was a general resolution that the American Bar Association opposes Federal legislation in the product liability area; just sweeping.

Well, the country was suffering about product liability litigation and President Ford appointed a study committee. That committee confirmed the product liability difficulty that was occurring. Presi-

dent Carter, in an attempt to rectify it, appointed a committee to draft a Federal uniform product liability act. That was done, to be voluntarily adopted by the States. No State adopted it.

The matter came before the National Conference of Commissioners of Uniform State Laws. We considered it and reached the conclusion that to draft a uniform State act would be useless because all the States would not adopt it. Only some few would adopt it in whole or in part. It would not be in effect in all States. That is a very important factor to this committee.

Then, in 1982 there came before the house of delegates a motion, again from Mr. Sevier's section to reaffirm the position of the American Bar Association. There was opposition to that, in which I took part, and the house, on a motion by the Tort Committee, postponed the matter until this last February, and we debated it last February.

At that meeting, two committees, which I explain in my written papers—and I want to proceed as fast as I can—

One of the major factors to which I want to call your attention is that the house of delegates approved a provision in the special committee's report that there is an absolute necessity now for Federal product liability legislation in the area of asbestosis cases, of which we happen to have 1,600 in our office. The accumulations of these cases are destroying businesses and if the delays go on with respect to other phases of business they will destroy them as well.

You are invited, by the special ABA Committee, you are urged to draft Federal product liability legislation respecting asbestosis cases. This is absolutely right, but at odds with the position taken by Mr. Sevier's section and by the famous Dean Keeton whom I admire very much and heard earlier, that there be no broad Federal legislation.

Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF ALBERT E. JENNER, JR.

I appreciate and thank you for the opportunity this distinguished committee has extended me to discuss with its members the serious concerns of the citizens of our country, particularly national manufacturers, producers, sellers and distributors, large and small, as well as consumers, with the problems, especially on a national basis, of escalating product liability claims.

I am a long-time member of the Illinois Bar and a senior partner of the Chicago law firm of Jenner & Block whose many partners and associates try cases and engage in appeals in state and federal courts throughout the nation in the civil, criminal and agency fields.

Relevant here, as I hope to demonstrate, is my membership in and past presidency of the National Conference of Commissioners on Uniform State Laws; also my membership in the House of Delegates of the American Bar Association since 1948. I am a past president or chairman of a number of national legal associations and societies and bar associations, including among them the American College of Trial Lawyers. For many years, I have been very active in the affairs of the American Bar Association as a member of its Board of Governors, Chairman of several sections and standing and special committees.

I will not burden you with further recitals of my professional career. The comments I have made are intended only to acquaint you with my broad experience in the practice of law, participation in the work of the organized bar and my awareness of the important issues involved in the Senate bill on product liability now before you.

I am fully cognizant of the tremendous investigation and study you have conducted with the aid of your most able staffs, contributing scholars, national business or-

ganizations, many organized bar representatives, and individual lawyers who have appeared before you or submitted comments on all aspects of Senate Bill 44. For that reason, I shall attempt to limit my general comments and direct my discussion primarily to (1) the American Bar Association's History on Product Liability claims growth and (2) resolutions of the American Bar Association, its House of Delegates and its several interested sections and special committee with all of which I have been fully acquainted the past five or six years. I will refer to the culmination of the American Bar Association's activities that occurred during the annual Midwinter Meeting of the Association in New Orleans in February of this year.

Turning first to the product liability problems that have become a serious burden on interstate commerce throughout the nation that has brought about widespread demand for a federal uniform product liability law, I fully share Senator Robert W. Kasten, Jr.'s Observations published in the Congressional Record of January 6, 1983.

I strongly believe that the product liability problem is one of the contributing elements involved in our national economic recession and calls for its resolution as an aid further to stimulate what now appears to be our gradual steady but slow growing recovery from that recession.

In the March, 1983 issue of the American Bar Association Journal (p. 280), the Board of the Journal reported the results of a survey respecting pending federal legislation conducted by a well known respected New York public research firm at the request of the Journal. Of the five pending legislation issues included in the survey, approval of federal product liability legislation scored strongly (66.5 percent). Inquiries on a random interviewee selection basis were made of some 600 members of the Association. Only 23 of the 600 said that Federal product liability legislation was of little or no importance. None opposed the legislation, these results are not only at odds with the House of Delegates action at the Association's midwinter meeting in New Orleans but are significant and reassuring respecting the efforts of this Honorable Committee.

Fortunately, Because of the commerce clause of the United States Constitution, none of our 50 states may interpose trade restrictions between the states. It is because of both freedom of trade and travel among and between the states, businesses, whether corporations, partnerships or otherwise, without individual state trade restrictions, can merchandise, send and sell throughout our 50 states. This is true of both large and small businesses. By doing so they are distributing the expertise-results of innovations and the research work of all our citizens who enable the businesses freely to invent, create and peddle their wares.

This is primarily why, together with the bill of rights, this nation is the greatest on earth. But the growth of product liability law in its various aspects in each of the 50 states has clouded our economic growth. Product liability judgments have become so large and their imposition in each of the states so disparate that a uniform federal product liability law applicable as to all states throughout the union has become an immediate necessity.

It is common that a manufacturer or business in one state may manufacture or produce its products not only in its home state but also in one or more other states, sell its products in other states even though not manufactured there often including purchasers from still another state or states. A claimed defect in the design, manufacture or production of the product arises. It necessarily involves laws of the several states in which that product is manufactured, distributed and sold. The question arises as to what law is applicable, what forum controls. The important concern is how can the manufacturers, producers or sellers anticipate what the law is or will be. Under present law in the various states they cannot do so. Excessive and costly litigation burdens must be faced. Small businesses who market their products interstate, as a great many of them do, are most seriously adversely affected. While it is true that larger businesses have a broader financial and asset base over which to operate, faced with the enormous spate of attorney's fees, costs and expenses, even they have reached the point of financial limits.

It is well known that businesses market well over 50 percent of their products in states other than the state in which they are produced. Each of the other states have product liability laws that differ from each as well as those of the producing states. The businesses are choked, as is the economy. A uniform federal product liability law is an absolute necessity.

The enormous growth of asbestosis product liability cases in recent years is an example known to everyone throughout this nation. It has already brought three well-known large corporations into our bankruptcy courts.

Attempts to achieve uniformity in and among the states has been painfully unsuccessful. The national Conference of Commissioners on Uniform State Laws consid-

ered whether to undertake the preparation of a proposed uniform state law on the subject but determined it should not do so because of the conflicting statutes and court made law, often called common law, existing in each state of the union. In addition to being learned, the commissioners were also practical. Where, as here, there are differences between the laws of every state the adoption of a uniform state product liability law by all of the 50 states would be necessary to bring about uniformity as to all of the states and would be miniscule. The passage of a uniform state act in one state or even four, five or ten states would not meet the need; in fact, it would enlarge the problems sought to be remedied and further deplete the economy.

PRODUCT LIABILITY HISTORY OF THE AMERICAN BAR ASSOCIATION

I now turn to the history of the American Bar Association, its Board of Governors, Sections and Committees, over the past several years, culminating in the action of its House of Delegates in New Orleans in February of this year.

Product liability law has undergone quite considerable change over the past ten years. See Epstein Model Products Liability Law, 1980. Many businesses were experiencing great difficulty in being able to afford product liability insurance. In 1976 President Gerald Ford appointed a task force to study the product liability problem. The task force did so and reported and confirmed that the state to state inequities and differences as to product liability claims were causing serious economic problems throughout the nation. Basically, the problems were raising costs in resolving product liability litigation, disincentive on the part of manufacturers and producers toward innovation of any products or improvement of existing ones and a tremendous rise in insurance rate making premium practices. Compounding the problem were constant changes in the precedents developed independently by the judiciary of each state. Not a single state law was, or is even now, comprehensive.

Two years after the task force appointed by President Gerald Ford submitted its report, President Carter directed the United States Department of Commerce to draft a model Uniform Product Liability Act for voluntary consideration and adoption by the states. The states did not respond. That was no surprise, as the National Conference of Commissioners on Uniform State Laws anticipated when there was a similar proposal presented to it.

Suddenly, in August, 1980, the Council of the Tort and Insurance Practice Section of the American Bar Association recommended that the Association take a position opposing the enactment of federal product liability legislation applicable in all 50 states. No other sections or committees of the Association became involved. The Association's House of Delegates, at its 1981 mid-year meeting, without discussion or debate and late on the calendar of the House, adopted the Tort Section's resolution which recited that the American Bar Association oppose federal product liability legislation, including House Bill 7921 then pending in the House of Representatives.

Under the Constitution and By-Laws of the Association, the resolution automatically became the policy of the Association, binding upon its Board of Governors, sections and committees unless and until the House of Delegates voted to change the resolution.

At the annual meeting of the Association in August of 1982, the matter of Senate Bill 2631 of which present Senate Bill 44 is the successor and counterpart, came before the House of Delegates but was not acted upon. Rather, a motion to defer to the Mid-winter 1983 meeting made by the Tort and Insurance Practice Section and to appoint a special study committee to report to the 1983 Mid-winter meeting was adopted. The Committee reported to the House of Delegates at that meeting. Its seven members were composed of able and distinguished scholars and practicing lawyers, the latter including plaintiffs and defendants product liability practitioners. The report was comprehensive. Four members of the Committee supported the report in full; two members strongly dissented, particularly with respect to the majority's opposition to then Senate bill 2631; three dissented from the majority's recommendation supporting federal legislation dealing with "work place" products liability claims but otherwise supported the majority report.

At the same time the section of Corporation Banking and Business Law and the Section of Public Contract Law, both very large and dedicated sections of the Association, submitted a joint report to the House of Delegates in which the arguments against Federal product liability legislation were thoroughly considered. The two Sections rejected the report of the *Ad Hoc* Special Committee and reported that it supported "the principle that would bring about uniform national rules of law in product liability litigation."

I assume that you and your staffs have copies of the extensive and carefully prepared joint report of the Banking Law and Public Contract sections, as well as the equally extensive and careful and thorough report of the Special Committee. All the reports are a goldmine of relevant information. If you do not, I will be pleased to supply copies.¹

The Special Committee proposed five resolution recommendations. They were:

(I) The Association opposed broad federal legislation "such as Senate Bill 2631";
 (II) The Association support "Federal legislation which addresses the issues of liability and damages with respect to claims for damages . . . by those who contract an occupational disease (such as asbestosis) when (a) there is a long latency period between exposure to the product and manifestation of the disease"; (b) the number of such claims and liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and (c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

(III) The Association support enactment of federal legislation eliminating product liability risks between the federal government and its contractors and providing, in certain instances, indemnity against those risks;

(IV) The American Bar Association support enactment of federal legislation that, in any product liability action in which damages are sought for harm for which the person is injured is entitled to compensation under any state or federal workmen's compensation law would accomplish. . . . A credit against a damage award equal to the workmen's compensation benefits paid or payable, regardless of the employer's negligence; in all cases the employer's right of subrogation for workmen's compensation lien be abolished; and no action or indemnity or contribution be allowed against an employer by any seller who is held liable in a product liability suit."

(V) The Special Committee concluded with a general resolution that the Association give attention "at the federal level" to the problems inherent in awarding punitive damages in product liability claims based on the same operative facts, such as design defects or failure to warn.

The Special Committee's second resolution is particularly significant and important. At odds with its first resolution, the Committee acknowledges the need for federal legislation applicable to all 50 states as to asbestosis and like inflections. This is at odds with the Committee's first resolution insofar as federal legislation is concerned. This honorable committee and its Senate Bill 44 addresses the remaining resolutions of the Special Committee.

When the reports and resolutions of the two sections and special committee came before the House of Delegates, an extended and careful and well articulated series of individual debates and presentations took place. The Association's Board of Governors presented the resolutions to the House "without recommendation." A "without recommendation" submission by the Board of Governors means that the Board neither opposes nor recommends resolutions.

It is significant that the litigation section of the association, consisting of some 50,000 members, opposed the recommendation of the Banking and Public Contract Law Sections and those of the Special Committee. The Tort and Insurance Law Section, also a large group, joined in the objections of the litigation section. I participated in the debate, supporting the banking and Public Contract Law Section resolution, as well as the then Senate Bill 2631. A substantial number of members of the House of Delegates are members of the Litigation and Tort Law Sections. By divided vote, the House of Delegates rejected the resolution of the Banking and Public Contract Law Sections and approved the Special Committee's recommendations as to I by a vote of 185 to 113, recommendations II and III by voice vote, defeated IV by voice vote and defeated V by a vote of 141 to 127. Thus, the House of Delegates supported federal legislation addressing asbestosis and similar diseases in contrast with the rejection of resolution I. The action of the House, having in mind the large number of litigation and tort section membership in the House of Delegates itself, was a relatively close vote.

In substance, the action of the House of Delegates is a mixed bag. Yet approving of federal product liability legislation as to asbestosis and similar diseases, allocating product liability risks between the federal government and its contractors, and opposing the enactment of broad federal legislation in the product liability field, including Senate Bill 2631; rejecting workmen's compensation claims payments as a

¹ The American Bar Association and its House of Delegates, in my considered opinion based on my long participation in each body, are tremendously and honorably dedicated and have the interest of this nation very much in mind at all times. I am proud to have been and still am a long-time member of each group.

credit against product liability judgments and also the punitive damages proposal of the special committee. The mixed and somewhat contradictory action of the House of Delegates supports and encourages your consideration of Senate Bill 44, with which I agree.

I should call your attention, before closing my remarks, to the very recent (yet unpublished) decision of Honorable William T. Hart, Judge of the United States District Court of the Northern District of Illinois, with respect to a startling asbestosis case before him in which there were some 10 corporation defendants charged with asbestosis public liability claims. The court had before it an application by plaintiff-creditors in bankruptcy proceedings for the appointment of a representative for "Unknown Putative Asbestosis-Related Claimants." In concluding his extensive and learned opinion, Judge Hart said:

"The Court is aware that there are proposals before Congress to create solutions for these problems, both for the companies and the present and future claimants. That is the place a solution must be found. There is no authority in the statute or the constitution for this Court to grant the debtors the relief they seek."

I have submitted copies of the opinion with my written remarks.

Senator KASTEN. Thank you very much. Mr. Monty Preiser, representing the West Virginia Trial Lawyers Association. As you can guess, you are not the only trial lawyer or trial lawyers association that requested an opportunity to appear, so you are representing a large number of people and we are happy to hear from you and have your testimony.

Mr. PREISER. Thank you, Senator. That is a great burden and I will try to live up to it.

For the record—and I know that you have a handwritten copy there—my name is Monty Preiser. I am a spokesman for the West Virginia Trial Lawyers Association. We represent, Senator, individuals who are injured. Our association is made up of lawyers that are actually in the field.

With all due respect to the rest of the panel that I have seen here and those others I have already seen testify, I am quite young compared to most of them. However, I dare say that I may be the only individual who is out there actually trying the lawsuits in a number of States, and that may become very important, Senator, when we talk about uniformity.

It looks like we have three primary issues here. One, and probably the most foremost issue, whether the Federal Government has any business, with all due respect, intruding on the States rights and the States right to make whatever law they deem necessary. It is being done and offered under the guise of the Commerce Committee, of course.

Whenever that has been done before, Senator, we have taken care of citizens who have not had grievances or a way to have their grievances taken care of. Civil rights law, Federal Tort Claims Act, all of those give the right of compensation to citizens who are not able to be compensated. It is absolutely not the case with this bill, which does nothing but take away the rights of citizens of this country.

That is not what the Congress is for and the Congress should not be involved. We talk about uniformity. There is no uniformity of damages. There is a uniformity, Senator, nationwide of liability and don't let these people stand here or sit here and tell you there is no uniformity of liability. I will give you the test, if I can. It is the same in every State. I handle cases in some 12 States.

A manufacturer has a duty to find out the hazard and the damage that his or her product might cause. The manufacturer has

a duty to guard against that hazard and design that hazard out of the product if technologically and economically feasible, and if the manufacturer cannot do so, the manufacturer must properly warn about that danger.

It is the same in every State, bar none, and we do not need any change in that area. The damages are different. You have heard the discussion of the differences in damages. We have a problem where in product liability cases you will have comparative negligence, whereas you are going to have contributory negligence in other types of actions.

When they are put together, as discussed in the last panel, the confusion among the jury is going to be unbelievable. Senator, I tell you that you are going to have 50 States interpreting this bill. The very fact that such excellent scholars are here today, yourself and Senator Heflin, disagreeing on interpretation. Mr. Sales himself is saying he interprets it this way and that way. You will have the same problem with 50 State courts interpreting the bill and the meaning of the language every time we have a case going to court. It does not help uniformity.

Second, probably the third issue—the second being uniformity—is there really a problem? We called for an investigation of the insurance industry who has caused this problem. We have called for it before. Insurance rates are out of control. The growth of the insurance companies are incredible. The insurance companies have been called down before for misadvertising and misleading advertising. They are doing it again.

They are taking in megabucks in premiums and paying out no bucks, yet they try to create crises and come here and say there are crises when there is not. There is no evidence that any business has ever folded because of product liability rates or product liability cases. I say to the public, Senator, and I hope the public takes a look at who is supporting this bill—insurance industries, manufacturer industries, lawyers who make a living representing manufacturers who if they did not sit here and testify for this bill would lose their clients and their job, pure and simple.

That's who represents or supports it, not like lawyers, by myself and consumers who are injured and people like myself who see people who are quadraplegic, hands off, children with no parents, because of products that are purely and simply defective. If it is not defective, no verdict is going to come down against the manufacturer.

Senator, I appreciate the opportunity to speak here today. Again, I say that the law is fairly uniform. Do not listen to all these differences in interpretations of different products. If a product is defective and hurts someone, it is unreasonably dangerous, I do not care how simple the product might be. A simple lighter, if it blows up, it is unreasonably dangerous and it is defective. That is all there is to it.

Manufacturers must design that out of their product or warn against it. It is the same everywhere. I say this because I heard your opening statement and I obviously disagree with it. I think you have been misled information. I think you should take another look at it, Senator, and support and legislate for the people of this

country and not pass a bill that does nothing but protect the manufacturers of defective products.

Thank you.

[The statement follows:]

STATEMENT OF MONTY L. PREISER ON BEHALF OF THE WEST VIRGINIA TRIAL LAWYERS ASSOCIATION

I am Monty L. Preiser, a Charleston, West Virginia attorney. I am an officer of the West Virginia Trial Lawyers Association, on whose behalf I appear today. Our membership is composed of lawyers who are not only consumers themselves, but whose principal practice involves the representation of injured persons. Because of this, our membership sees firsthand the numerous and sometimes horrendous injuries defective products can cause. We also have firsthand knowledge of the easily corrected nature of many of those defects and the lack of proper warning to the user.

We are appreciative of the opportunity to appear before this Committee to present our position on S. 44, the so-called "Product Liability Act."

Of course, the regulation of interstate commerce is a constitutional responsibility of the Congress. Among the hallmarks of fulfillment of that responsibility, and the accomplishment of proper national purposes, are child labor laws; wage and hour laws; civil rights acts; the Jones Act; and the Federal Employers' Liability Act. These statutes, along with others, were adopted to remedy wrongs which were either ignored by the states, rejected by the states, or which the states were incapable of remedying. In each case, Congress enacted laws to compensate people for wrongs committed against them.

Now, some in Congress not only seek regulation of an area, product liability, that states are already regulating, but those same people ask you to adopt a statute that serves only to take away rights that citizens already have.

Unfortunately, the wrong area is being investigated when we try to determine whether or not the federal government should become involved in a sweeping rewrite of product liability law.

It is the entire insurance industry, and its misleading and even deceptive practices, into which this Congress should delve.

I am not prepared today, and I would doubt that time would permit, to discuss the bookkeeping practices, the astounding growth picture, and the anti-consumer activities engaged in by the insurance industry. However, the parent organization of the West Virginia Trial Lawyers Association is the Association of Trial Lawyers of America, and we would defer to representatives of that organization to discuss these matters. I am certain that they are ready and able to do so, and I implore this Committee to listen to them and give great weight to what they have to say.

We have seen, in the past number of years, the insurance industry, the medical profession, and the manufacturers of this country attempt to create artificial crises, and then call for so-called "tort reform." No crisis has ever been demonstrated, and one does not exist today in the United States with regard to product liability. Studies show what we practicing lawyers know, that the injured person loses far more cases than he or she wins. The insurance industry also takes in far more in premium dollars than it pays out. If so, where is any crisis?

There have been those who have asked me whether or not we would still be opposing this bill if it increased the rights of individuals. Our answer would be an unqualified "yes," because it would do nothing more than doom the common law to a position of unchangeability. It would forever prohibit our state courts from adapting the law to fit the times, which has long been the majesty of the common law.

The states are doing the proper job at the present time in regulating product liability. Should the federal government pass this or any product liability law, that bill would say, in the final analysis, that the states lose their right to regulate the common law for all time. Do we want to see the federal government regulating other state matters such as divorce law, probate law, criminal law? Where will it all end?

The point of our testimony, which we hope is obvious, is that the federal government should not intrude into areas better left to the states. This bill would serve to protect no consumer. It would only serve to protect the makers of defective products. Is that the purpose of Congress?

The very real problem is that the bill would enjoin the state courts to follow, interpret, and comply with a new federally-imposed substantive law in the exclusive

area of state tort law, and thereby break for all time the fragile threads that weave the fabric of federalism.

James Madison, writing in the Federalist Papers No. 45, told us that, "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Nearly two centuries after the great Constitutional debate, the proper order of the federal system is still very much the issue, and this bill cuts at the very heart of historic and constitutional principles of federalism.

The bill further creates a new legal vocabulary, and to those who believe that the bill will aid uniformity, I say, "no." The cases will be tried in the state courts, and the state courts will each have to interpret what the new statute says. There will be no more uniformity. As a matter of fact, I say to this Committee that there would be uniformity now to a great degree in the state courts if the same so-called "tort reformers" who are pushing this bill had not continued to dabble and interfere in the state legislatures. Those same persons who upset the uniformity in the states now wish to create uniformity by federal fiat. We cannot let that happen.

Please be certain that we are in favor of progress, improvement, and change by the states, if need be, to insure the safety of products and provide full and fair compensation for persons injured by defective products. Our state, and most states, have done that very thing.

Our only opposition is to the federal government intruding, we respectfully say, into the areas where states are properly protecting their own citizens.

Senator KASTEN. Mr. Preiser, thank you.

Mr. Earl F. Morris, former president of the American Bar Association, from the law firm of Porter, Wright, Morris & Arthur, Columbus, Ohio.

Mr. Morris, it is a pleasure to have you with us.

Mr. MORRIS. As you have just said, I am a member of the Columbus law firm of Porter, Wright, Morris & Arthur. I have served as president of the Columbus Ohio State and American Bar Associations. I have been chairman of the board of directors of the American Judicature Society and am currently chairman of the board of trustees of the Institute for Court Management. I am a Fellow of the American College of Trial Lawyers. I appear today, however, in my individual capacity as a lawyer who has had many years of experience in litigation, including product liability litigation.

I am here to support enactment of Federal product liability legislation. I do not propose to address the particulars of S. 44. I have studied the bill and concur generally with its provisions. What I propose to discuss is the appropriateness of Federal legislation on this important subject.

As has been stated by Mr. Sevier, the American Bar Association House of Delegates took action at its midyear meeting opposing Federal legislation. I respect action by the house of delegates and by my testimony today I do not in any way wish to denigrate it. However, I spoke in favor of Federal legislation, as did Mr. Jenner, when that action was taken, and do so now because I believe such legislation is imperatively needed.

Moreover, in the March 1983 issue of the American Bar Association Journal, there appeared the results of a public opinion poll conducted for the association by the research firm of Kane, Parsons & Associates. A statistical sample of ABA members were asked whether they favored or opposed enactment of Federal product liability law superseding State law. The results were 49 percent in favor, 43 percent opposed, and 7 percent uncertain. Even more interesting, of those ABA members who said they attached great im-

portance to product liability law reform, 62 percent favored Federal legislation, and 38 percent opposed it. It is apparent that there is very substantial support within the legal profession for enactment of Federal product liability legislation.

Recent product liability developments have been of two types: court decisions and State legislation. The first have not only greatly expanded traditional tort responsibility in the product field, but more importantly have been widely varied in the principles applied. It has become virtually impossible for those who may be liable to predict intelligently what their responsibilities may be in any given situation.

Those who design, manufacture, and market products have a right and a need to know the standards by which society will hold them accountable for the safety of their products. Moreover, they have a right and a need to know that those standards, all things being equal, will not change while the product is in use. Today, they know neither of these things. When they look to the law in the 50 States and the District of Columbia, they find rules which differ widely in content and clarity. They find in addition that those rules change constantly and unpredictably.

With regard to the second product liability development, State legislation, the situation is that efforts to develop uniform legislation have failed, and that State-by-State legislation in those States which have enacted legislation has created a hodgepodge of variance. Product liability reform statutes have been enacted in one form or another in some 30 States. No two of these statutes are alike and in most of them fail to address the principal issues which arise in product liability cases. The net result is that we can say today with a high degree of confidence that the State legislatures will not enact the uniform, stable product liability rules which manufacturers, sellers, and users of products desperately need and deserve.

Put simply, product liability is a national problem, and the only practical solution for this situation is Federal legislation. While such legislation will furnish the needed guidelines to manufacturers and sellers, it will likewise be of service to consumers and the public generally. It is inevitable that so long as our system of handling product liability is faulty and liability is being unreasonably imposed upon manufacturers and sellers, consumers to whom the cost of such liability is inevitably passed, are vitally affected. Moreover, the public has a substantial stake in the orderly administration of justice, whether it be in the product liability area or otherwise, and the present totally inadequate and flawed situation flowing from court determination of and State legislation pertaining to product liability is inimical to the public interest.

My general inclination is to oppose Federal solutions of tort law problems. The reason for this is that most tort cases are purely local in character. The product liability situation is in striking contrast to this situation. The same product is sold nationwide. Issues as to defective design or workmanship arising in any of the 50 States and the District of Columbia should have uniformity of treatment. The only way of achieving this is by Federal legislation establishing the substantive law that will be applicable to claims wherever they may arise.

I thank the committee for the opportunity to appear here today and will be pleased to answer any questions.

Thank you.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Your Special Committee report contains the following statement:

"The Committee believes that totally predictable results under any tort liability standard are an impossible goal in an adversary system of justice."

My goal is to propose legislation that will set forth a coherent and balanced set of principles and rules to use in deciding product liability cases. The position of the ABA seems to be that if we had Federal product liability legislation, we would have endless interpretation problems. This position is similar to that of those who opposed the Uniform Commercial Code and the enactment of the Federal Rules of Evidence. Has the enactment of these model laws resulted in more confusion and more litigation and more instability than prior law?

Answer. To the contrary the Uniform Commercial Code and the Federal Rules of Evidence have resulted in less confusion, less litigation and greater stability than was the case prior to their adoption. There have been some different interpretations and applications of both the Code and the Rules by the courts but both have contributed to greater uniformity than previously existed.

Question. I understand that the recent ABA vote on product liability was very close. Could you tell me if this vote indicates that lawyers, in general, are opposed to federal product liability legislation?

Answer. The vote of the House of Delegates was 185 to 113 against federal product liability legislation. This is not a "very close" vote. The House of Delegates has traditionally opposed federal legislation in tort and related areas and, therefore, its vote on federal product liability legislation is not surprising. The poll reported in the March, 1983 issue of the American Bar Association Journal tends to show support among lawyers for federal product liability legislation, particularly among those primarily concerned with product liability law. I feel that it is very difficult to state with any degree of certainty whether lawyers in general favor or oppose federal product liability legislation.

Senator KASTEN. Mr. Morris, thank you very much.

The final witness on this panel is Mr. Carl Liggio, the American Corporate Counsel Association. He is a member of the board of directors of that group, and also with Arthur Young & Co. Mr. Liggio.

Mr. LIGGIO. Thank you, Mr. Chairman.

On behalf of the American Corporate Counsel Association, which is the only national bar association dedicated solely to the professional needs of members of corporate law departments, I am appearing here today to support the general concepts embodied in S. 44. The association is very supportive of the principles underlying this bill. We believe the elements of predictability and certainty, which it will begin to introduce into the areas of products liability law, are essential.

By way of background, and particularly in view of Mr. Preiser's remarks a few minutes ago, although I am a member of the bars of New York, the District of Columbia, and of Wisconsin, I do not practice in the products liability area, and have never practiced in that area. I am an interested observer of it. The entity which I represent as general counsel is a service entity; and if anything, we would be on the plaintiff's side of a products liability case.

So my interest in this, on behalf of ACCA, and personally, is because of a deep-seated professional concern for the problems that I see and the board of ACCA have seen in connection with the prod-

ucts liability area. We do not deny that adequate compensation should be awarded to individuals who are injured as a result of defective products, but we are equally concerned that there should be certainty and predictability in this area.

We also recognize that after this statute is enacted, if it is enacted, there will be areas that will still be uncertain, that will still be undefined, but the statute does give some predictability, and does give some uniformity.

As an observer of the scene, I disagree very strongly with Mr. Preiser's remark that uniformity already exists. If I may digress for a moment on the need for uniformity and predictability, as business people we are concerned about the cost of doing business. I believe Dean Keeton mentioned this in his testimony, and said the whole structure of the tort system, that is the cost of risk, should be one cost of doing business. We recognize that this is a risk of doing business. We also recognize that innovation is partially a function of risk assessment. To the extent that you do not have certainty and predictability, you cannot effectively make risk assessments.

Even in my business, the service business, my management continually asks me to assist them in risk assessment. In the areas that I cannot give them risk assessments because of uncertainty in the law, we on more than one occasion would back off positions we might otherwise take.

Historically, risk assessment has been able to be addressed in fairly limited bounds. However, as a result of the trends in the seventies in the tort area, I think that is no longer the case, and although it is difficult to prove a negative, I believe we will see less innovation as a result of unpredictability of risk assessment in these areas.

The second point I would like to briefly address is the costs associated with the products liability area. Although we will continue to have litigation, and there is no doubt about that, to the extent that certainty and predictability will be added to the system, which is what this bill does, I personally believe that it will materially affect the costs of this type of litigation by affording the opportunity for alternative dispute resolution techniques to be employed in the products liability area.

Although the basic concept of ADR is not novel or new, it has in the past 3 years begun to be given greater importance as a result of the skyrocketing costs of litigation. The Center for Public Resources in New York, a nonprofit organization, has done a tremendous amount of work in this area, and we are seeing more and more businesses looking for alternative approaches to compensate victims who have been injured and to maintain the costs of dealing with the problems of product liability.

The certainty and predictability that will result from the products liability legislation which this Committee is reviewing will greatly enhance the opportunity for ADR techniques in the future and, I think, will have a material impact on the cost of dealing with the problems of compensation of victims of products liability.

I thank you for the opportunity to appear here today.

[The statement follows.]

STATEMENT OF AMERICAN CORPORATE COUNSEL ASSOCIATION

Good morning, my name is Carl D. Liggio. I am the General Counsel of Arthur Young and Co., and a member of the Board of Directors of the American Corporate Counsel Association (ACCA). It is a pleasure to be here this morning to endorse enactment of S. 44, the federal Product Liability Act.

ACCA was established in the spring of 1982 and is the only national organization dedicated to serving the professional needs of attorneys practicing law as members of corporate law departments. Indeed, membership in ACCA is limited to lawyers who are employees of business organizations and who do not hold themselves out to the public for the practice of law. We have members from all fifty states and several foreign countries.

The policies of the organization are determined by the Board of Directors. I have attached to this statement a list of the ACCA board. On January 28, 1983, the ACCA Board of Directors adopted a resolution endorsing federal legislation, such as S. 44, that would bring a measure of certainty and predictability which is currently not present in the product liability area.

We debated at length the question of whether federal legislation was appropriate in an area of law traditionally reserved to the states. We believe, however, that it is an obligation of this country's legal system to provide at least some predictability to those who use it. Under the present system, a lawyer cannot advise his client on product liability questions with any degree of certainty. Further, it is unlikely that uniform state laws will be enacted to address the problem. For these reasons, ACCA endorsed the concept of federal product liability legislation.

I want to emphasize that ACCA's position on this issue flows from a professional concern over what we perceive to be serious problems with the manner and direction in which product liability law has developed under state tort law. As attorneys, we believe that Congress has an obligation to address the problems that are apparent in this area. Members of ACCA are active in other legal professional organizations, including the American Bar Association, and the American Trial Lawyers Association. We are disappointed that these other organizations have chosen not to endorse the concept of federal legislation, since we believe that a very significant segment of the bar agrees that there needs to be some reforms made in this area.

Product liability law has evolved from a blending of both contract and tort law concepts. It is primarily judge-made with a number of states adding a statutory gloss on common law concepts. Because of the way in which product liability law has developed, state law has become a crazy quilt of conflicting and contradictory theories. Even the most basic concepts vary from state to state.

Under traditional tort theory, a person is responsible for his or her acts and is held accountable for harms negligent or intentionally perpetrated. With the *Greenman v. Yuba Power Products* decision, 377 P.2d 897 (1963), it was recognized that in certain instances, manufacturers could be liable even without a demonstration of negligence or intent. The notion of strict liability was also articulated in the *Restatement, Second, torts*, section 402A, under which a product seller would be liable for harm flowing from products which were "defective" or "unreasonably dangerous." In more and more jurisdictions, however, courts are extending the strict liability theory well beyond the product defect type of case. The theory that is operating in those cases is that every harm must be remedied and that the cost of the injury should fall on the persons most able to pay—that is, the product seller.

The net result is a system in which the same product seller may or may not be found liable depending on the jurisdiction in which the case is brought or when the case is brought.¹ The problems this situation imposes on a product manufacturer and his counsel are substantial. It is impossible for the counsel of a product manufacturer to set out for his client what his liability might be in any given situation. Even though counsel can advise his client on what the law is in each state, he can give no guarantee that even the most basic notions of product liability law in a particular jurisdiction will not change by the stroke of a judge's pen.

The Report which this Committee produced to accompany similar legislation during the 97th Congress (S. Rep. 97-670) summarizes many of the significant variances in state laws and they need not be repeated here. The hearings this Committee conducted during the last Congress is replete with testimony setting out the confusing status of state law in this area. Even the opponents of federal legislation do not dispute that current state law is in an ever-changing state of flux. (See state-

¹ For example, compare *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972) with *Ward v. Ford Motor Co.*, 657 P.2d 95 (Nev. 1983).

ment of Ernest Y. Sevier, American Bar Association, Hearings on S. 2631, No. 97-109, p. 145.)

The only real question this Committee has to answer is whether it is responsible public policy to continue this uncertainty. We submit that under the current state of the law, product manufacturers and sellers are significantly harmed, consumers as a class do not receive a significant benefit, and increased product safety is inhibited. The only group we can identify that benefits from the current situation are attorneys who receive compensation for bringing and defending product liability suits.

As I understand the argument of the legal groups which oppose enactment of S. 44, it is that this is an area which has been developing through the operation of state law in a manner that is allegedly more responsive to the needs of the citizens of the individual states. ACCA might be sympathetic to this argument if it were not for the fact that under the status quo, claimants receive only a fraction of every dollar paid out. As the Committee report indicates, the legal costs borne by the parties are higher than the amount recovered by the claimants. We do not understand how it can be argued that consumers are served by a system in which the transaction costs are as high as they are in the product liability tort litigation area. The system is grossly inefficient.

The costs of defending against frivolous suits and of researching the same issues under contradictory state statutes are substantial. These costs are, of course, borne ultimately by the consumer. Additionally, the system is producing a disincentive for manufacturers to update the safety features of their products. This is because, in several jurisdictions, safety innovations made in a product after harm has occurred are admissible to prove liability. If a manufacturer is advised by counsel that safety innovations could result in adverse claims, the system is providing the manufacturer with a powerful reason to forego changes in product design.

It cannot be persuasively argued that any problems that exist can be addressed by state action. As yet no state has adopted the Model Uniform Product Liability Act drafted by the Commerce department. We emphasize, in this regard, that passage of uniform legislation in only a few states is of little help to a manufacturer who sells his products in fifty states and abroad. Actions by one or two state legislatures would not bring the required certainty and it is unlikely that fifty state legislatures will move to resolve this problem.

It is argued that enactment of a federal statute would lead to greater confusion because it would be subject to differing interpretations. What S. 44 and its accompanying legislative history do is enunciate certain basic, well understood principles of tort law and to set out the situations in which they will apply. Like any statute this one will have to be interpreted, but we submit that enactment will lead to more stability since the judiciary will have only one statutory road map to follow rather than the fifty that now exist.

It is also sometimes argued that federal legislation will straightjacket the law so that it can not change to meet societal needs. It must be remembered that S. 44 does not attempt to codify the entire products liability field. Instead, it sets out the basic principles. It leaves to the judiciary the task of refining those principles.

It is entirely appropriate for the Congress to consider enactment of federal legislation in the product liability area. Congress clearly has this authority under the Commerce Clause of the Constitution. Enactment of S. 44 would add clarity to this area of the law while still preserving the rights of injured plaintiffs to have their claims litigated. It is important that the Committee remember that we are not supporting this legislation to cut off legitimate product liability claims. Rather, enactment of the legislation will set out rules of the road so that our clients can conduct their businesses under a legal system that functions with a certain amount of predictability. The result will *not* be a system in which plaintiffs cannot sue and recover damages for harm caused by products. Instead it will be a system in which a higher percentage of the dollars paid out will be going to the injured consumer, rather than to his lawyer.

Mr. Chairman, ACCA appreciates the opportunity to participate in these hearings. It is our purpose today to address the principles of federal legislation in this area and not to endorse each provision of the bill. We will be happy to provide comments about the specific sections of S. 44 and we stand ready to provide any other assistance the Committee may wish.

Senator KASTEN. Mr. Liggio, thank you very much.

Mr. Jenner, you mentioned that the ABA House of Delegates voted against endorsing product liability legislation, and Mr.

Morris talked about a poll, a 1982 poll that came out the other way. How do you explain this difference?

Mr. JENNER. Mr. Chairman, in my written report I discussed the matter Mr. Morris raised and emphasized the fact that the result of the poll is absolutely at odds with the action of the house of delegates in February with respect to the first general resolution that there be no Federal public liability legislation in the broad sense.

Then I also want to add that the house of delegates itself took a different position on asbestosis, which I have already called to your attention. That is that the house of delegates passed by a very substantial vote—there was a vote on each one of five proposals that—urging this committee and the Federal Government to do something by way of a uniform act with respect to asbestosis cases.

Senator KASTEN. How do you explain that the poll comes out one way and the vote in the house of delegates comes out another? Is the house of delegates unrepresentative?

Mr. JENNER. Well, I will be very candid with you, Senator, and to my friend on the right here, and he is my friend. In the house of delegates, the proposal of the banking and trust law committee was opposed by the litigation section consisting of 50,000 members, and by the tort section consisting of 30,000 members.

A number of them are members of the house. They are lawyers who make their living in that area. The motion was defeated; that is, the general motion in favor of Federal product legislation. But they could not overcome the feeling of the lawyers in the house that asbestosis is so dangerous in that the cases were increasing by leaps and bounds and so threatening that something had to be done.

Senator KASTEN. Would that then suggest that if this problem continues to explode, if, let us just for fun say, the problems we have in other areas, machine tools, if that started to grow, all of a sudden the house of delegates would agree to that particular problem?

Mr. JENNER. They would have to. The citizens of this country would insist upon it. You are already responding to the views of the citizens of this country indicated in the poll to which Mr. Morris called attention and to which I also do in my written remarks, the levelheaded people affected by the serious inroads on our economy and the destruction of business.

That is why this committee is entitled to the greatest possible credit for having the courage, against all the opposition of trial lawyers across the country, of proceeding to address this important problem. You are the representatives of the people, the Senate and the House, and you respond to the needs of the people and you are doing a fine job.

And if I may add one further comment, I call attention in my written report to the recent decision of Judge William Hart, U.S. district judge for the northern district of Illinois, in late March, involving a corporation, a very large corporation in reorganization under chapter 10 of the Bankruptcy Act. There was a motion before him dealing with how to frame the law or an order with respect to those not yet in being who become afflicted with asbestosis.

In rejecting that motion the court said: "The court is aware that there are proposals before Congress to create solutions for these

problems,"—that is, product liability, especially as to this corporation that went into bankruptcy—"both for the companies and the present and future claimants. There is no authority in the statute or the Constitution for this court to grant the debtors the relief they seek." That is for the legislature, the U.S. Congress, and I recommend it.

Senator KASTEN. Mr. Sevier?

Mr. SEVIER. Mr. Senator, I would like to respond to the question about the poll, unless that was included in your question.

Senator KASTEN. Go ahead. Why do you not do that very quickly? I have an additional question.

Mr. SEVIER. First of all, the poll as I understand it was 528 lawyers and 78 young lawyers or law student representatives out of the 300,000 membership of the ABA; and that the largest pro-Federal legislation group was persons who felt that this was an extremely urgent or important matter, who, of course, are the representatives who wish to have the Federal legislation versus the elected members of the delegates who speak officially for the ABA.

The house of delegates took this up two times, Senator. Incidentally, our section has one representative, elected representative, to the house who is from our section. They took this up two times, one last fall, and at that time there was a motion to defer—it was not by our section, it was by another, but in any event that is unimportant—a motion to defer, and a study group appointed, and a 42-page report emanated, and that 42-page report was disseminated to every delegate of the House of Delegates.

The matter was debated at length in both sessions, last fall and this spring. The manufacturers' representatives circulated voluminous amounts of information to all the members of the house, and with this large informed decision that they had gone over for several months, these elected delegates came up with the decision, as I said, by 62 percent.

I am sorry I interrupted your question.

Senator KASTEN. Let me followup on that for a minute. I am not a lawyer. I do not understand how the ABA, the bar association committees work.

Mr. SEVIER. I would be glad to submit that to you later.

Senator KASTEN. It seems to me, based on the testimony here today, plus what has been going on now for the last couple, 3 or 4 years as this legislation was beginning, that essentially we separate the trial lawyers from the lawyers. The lawyers are in favor of some kind of Federal product liability legislation and the trial lawyers are not.

So that when you are in a group of all lawyers nationwide they come out with results saying, yes, we think there ought to be some kind of Federal tort reform. But when we get into a small group in which the trial lawyers have a disproportionate representation, such as some of these groups, then the votes start coming out closer.

We have many more lawyers contacting us in favor of this bill than we have contacting us in opposition to this bill, and the only lawyers who are contacting us in opposition to this bill happen to be trial lawyers. So it seems to be that the whole community, the legal community nationwide, is in favor of some kind of change

here, but in some of the small groups or committees or subcommittees in the house of delegates, it seems that the trial lawyers group has a disproportionate representation, maybe because they are more energetic, maybe because they come to the meeting, maybe because of how your committee is chosen, whatever.

But it seems that when we get into your ABA groups that the trial lawyers have a disproportionate voice, a disproportionate weight, as opposed to the overall community. Is that a fair analysis?

Mr. SEVIER. Respectfully, no. The American Bar Association and the house of delegates—I would be very surprised if the majority of the house of delegates constituted trial lawyers.

I would be glad to submit and would ask for permission to submit, Senator, to your committee a list of the various membership of the American Bar Association House of Delegates.

[The following information was subsequently received for the record:]

BREAKDOWN OF HOUSE OF DELEGATES MEMBERSHIP

State Delegates: 52; State and Local Bars: 195; Board of Governors: 16; Former Members of Board of Governors: 13; President: 1; President Elect: 1; Former Presidents: 17; Former President and Former Chairman: 3; Former Secretaries: 6; Treasurer: 1; Former Treasurer: 2; Chairman: 1; Former Chairman, House of Delegates: 7; Assembly Delegates: 15.

ABA DIVISIONS

Public Contract Law Section: 1; Administrative Law Section: 1; Law Student Division: 1; Legal Education and Admissions to Bar: 1; Litigation Section: 1; Taxation Section: 1; Labor and Employment Law Section: 1; Natural Resources Law Section: 1; Judicial Administration Division: 1; Patent, Trademark and Copyright Law: 1; International Law Section: 1; Antitrust Law: 1; Criminal Justice Section: 1; Economics of Law Practice: 1; Young Lawyer's Division: 4; Tort and Insurance Law: 1; General Practice Section: 1; Corp., Banking and Business Law: 1; Public Utility Law Section: 1; Science and Technology Section: 1; Real Property, Probate and Trust: 1; Individual Rights and Responsibilities: 1; Urban, State and Local Government: 1; Family Law Section: 1.

OTHER

Conference of Chief Justices: 1; Lawyers Club of San Francisco: 1; Lawyers Club of L.A. County: 1; Federal Communications Bar: 1; Director, Admin. Office of the U.S. Courts: 1; National Conference of Federal Trial Judges: 1; Federal Bar Association: 1; Attorney General of the United States: 1; National Bar Association: 1; American Judicature Society: 1; Chicago Council of Lawyers: 1; National Association of College and University Attorneys: 1; National Conference of Commerce on Uniform State Laws: 1; Conference of Administration Law Judges: 1; National Association of Women Lawyers: 1; The Association of Life Insurance Counsel: 1; National Conference of Special Court Judges: 1; National District Attorney's Association: 1; Appellate Judges Conference: 1; ALI: 1; National Association of Criminal Defense Lawyers: 1; National Conference of Bar Examiners: 1; National Legal Aid and Defender Association: 1; Judge Advocates Association: 1; National Conference of State Trial Judges: 1; National Association of Attorneys General: 1.

Incidentally, the U.S. Attorney General, the Office of the U.S. Attorney General, is a member of the house of delegates. Nobody from there addressed the issue here. Our section happened to be a section of trial lawyers that did submit this to the house. The matter was debated among lawyers who had nothing to do with litigation in this field whatsoever, and they would certainly be a majority of the house.

The vote of the whole house taken, as I said, from this wide spectrum and from the various bar groups across the country, voted overwhelmingly to oppose broad preemptive legislation in the field.

Now, in the discrete issue Mr. Jenner talked about, and as a matter of fact I agree with that—

Senator KASTEN. It is fair to say we have a little bit of disagreement, nevertheless. The report of the ABA's special committee to study product liability reflects what we looked at as a strong bias against product liability legislation, and you are repeating that. You say, and I will quote from the special committee report.

"The committee believes that the common law must remain as free, as responsive and as refreshing as the reflection of the human spirit of a free people." And then it goes on to elaborate a series of arguments against any Federal product liability legislation.

Now in your testimony before us last year you stated that the ABA did not oppose enactment of its rules or model acts by any States. In other words, at that point you were testifying essentially that the law was not so bad and you were not necessarily in disagreement with parts of what is now S. 44. You said it should be enacted at the State level rather than at the Federal level. You made a difference there.

Now, today you fudged that further in terms of trying to figure it out. Is the ABA in favor of State product liability law?

Mr. SEVIER. Well, Your Honor—Your Honor—Senator—I did not realize that I was fudging, but I think if you work this backward you will find I was not. First of all, last year at the end of the questioning you asked me, Does this mean that the ABA is opposed to any sort of enactment of a uniform act on a State level, and I said, No position has been taken on that, and no position has. The resolution that you have a copy of that states the American Bar Association is not opposed to any enactment of model State acts.

I do not think that position has changed one whit. It does not mean we are in favor of it, it does not mean we are against it. We have not taken a position in regard to that.

There was a second part to your question.

Senator KASTEN. It sounds like if you say that the committee believes that common law must remain as free, as responsive, and as refreshing as the reflection of the human spirit of a free people, and it goes on to elaborate these arguments against products liability, that that implies you are against State law as well. That is not the case?

Mr. SEVIER. I do not think so.

Senator KASTEN. You are not in opposition to it. You are not necessarily in favor of?

Mr. SEVIER. I refer you to the same report. I cannot put my hand on it here, but they quoted Dean Roscoe Pound stating that the interaction at the State level of State legislation and State common law was a very important aspect of this, and this is part of the same report.

Senator KASTEN. I am aware of the Trial Lawyers Association and representatives of trial lawyers who have testified in various States in opposition to State product liability law. But your understanding is that the ABA has not taken that position?

Mr. SEVIER. That is correct.

Senator KASTEN. I thank you for that. We were confused.

Mr. Preiser, West Virginia, your State, adopted a form of strict liability in the case of Black & Decker. That form of strict liability is identical to the negligence standard which is being proposed in S. 44. My understanding is that the courts said the general test for establishing strict liability in tort is whether the involved product is not reasonably safe for its intended use. The standard of reasonable safeness is determined by what a reasonably prudent manufacturer's standard should have been at the time when the product was made.

Now, what is your objection to having that particular standard codified in Federal legislation?

Mr. PREISER. As a matter of interest, Senator, that was my case. I wrote the brief and argued the *Morningstar* case in the Supreme Court of West Virginia, and am familiar with it, of course.

It is not the holding of the court, obviously, that we would object to. It is primarily the Federal Government coming in and preempting the State law. In West Virginia it may not make a change. It goes a bit further, *Morningstar*, than you read, of course. Whether it makes a change or not in West Virginia is just pure and simply not the issue.

Senator KASTEN. So the standard of reasonably prudent manufacturers standards, et cetera, you do not quarrel with that? You think that might be reasonable. The question is at what level do we impose it? So you agree with that standard?

Mr. PREISER. Oh, of course. There is nothing wrong with the standard itself if we want to talk about substance, but that is the standard everywhere. For those who say it is not—may I, since you mentioned I am representing the Trial Lawyers Associations, maybe more than one—may I take an extra minute and give you an example, Senator—

Senator KASTEN. Sure.

Mr. PREISER [continuing]. Of why I think you have some misinformation? For example, they talked about the *Lawnmower* case and how acid on new grass might cause a problem with the lawnmower.

Senator KASTEN. Yes.

Mr. PREISER. Or the 1940 car. Senator, no competent product liability lawyer would sue under that standard.

Let me talk about cranes. The reason I choose cranes, I notice that Mr. Head is president and general counsel of the FMC Corp. and he may talk about cranes. And also, on page 137 of the transcript from the hearings in June 1982, they gave you examples about cranes, Mr. McKeehan from the Business Roundtable, the same group that the gentleman coming after us is going to represent.

Let me tell you about cranes for a minute, Senator, because I think it is a very good example. These cranes are manufactured to last for a number of years, 10, 15, 20 years, whichever it may be. There were some engineering principles that were available say in the sixties, early sixties, late sixties, that were not available in the sixties, that are available in the eighties.

For examples, there are devices you can put on a crane so that when it is near a power line a buzzer goes off and you do not get near the line. Or you can use fiberglass to manufacture the boom; when it touches a line, nobody gets electrocuted. That has been available since 1960.

If you had a case in 1980 for a crane in 1960, as long as you could show that those safety devices were available you should be able to bring the lawsuit. However, Senator, there is now a way to make remote controls, such as radio controls, sound controls, and fiber optics. Fiber optics were not available in the sixties that would protect the operator.

We could not now say to the manufacturer in any State in the Union that you should have had fiber optics, fiber optic controls to protect the consumer. But we can say in every State in the Union, and it only makes sense, that in 1966 you knew you could have made this of fiberglass, you knew you could put a rubber cage around it, you knew you could put a warning device on it, and we ought to be able to bring the cases on a 1960 manufactured crane if they knew about it in 1960.

Go to the lawnmower. If there is a new grass that has been developed in the eighties, no competent lawyer would bring the lawsuit. So whether or not it is the same or not does not make any difference.

Back to your original question, the question is, do we need it on the Federal system. I answer you again, no, the Federal Government has no business being there because it is just taking away the rights of citizens.

Second, we are already pretty uniform. I would respectfully suggest that anybody who says we are not, I can ask them a series—I gave you the series of questions before. You could ask them those questions, ask them those five questions. That shows liability in every State in the Union, and they cannot disprove that.

Senator Kasten. Mr. Morris—actually I want to ask this question of a couple of you, but basically this negligence or fault-based standard of reasonable care applies to actions involving architects or engineers or lawyers or doctors or just about anybody. Why is it, then, that there seems to be this effort to subject manufacturers to a different or to a strict liability standard?

Mr. MORRIS. I think it has been developed here this morning that we simply had the historical evolution that dealt with product liability. When the restatement took the position it did, it developed at that point the law of strict liability as it applied to product cases. That same type of movement has not come to other types of litigation such as you have just referred to, and those continue to be within the traditional format.

As I understand this legislation, it is basically continuing strict liability as it applies to workmanship problems and provides for the test of negligence, as it applies to design defects and warning.

I think that the answer is that it is simply developed in the product field. As I understand this legislation, it does not undertake basically in those areas to go beyond what the present law is as it applies to what you are referring to as the strict liability field.

Senator KASTEN. Mr. Preiser?

Mr. PREISER. It is a very good question, Senator? As a matter of fact, I think Mr. Sales testified that strict liability began with section 402A when it was codified. That is really not true.

Strict liability has been around for some 60 or 70 years, beginning with the old food cases where people found toes in tobacco and things of that nature, and went on to Justice Traynor.

Senator KASTEN. That in our opinion is a construction, not a design defect, the reference you just made.

Mr. PREISER. There is more of a history in strict liability.

Senator KASTEN. I just want to make sure you understand but your history did not apply to what we are trying to work with in this piece of legislation.

Mr. PREISER. That is true.

Now as far as strict liability, it came along primarily because of the very grave difficulty of proof against a manufacturer, the old Coke in the mouse bottle is the great example. The manufacturer would say—

Senator KASTEN. The "mouse in the Coke bottle"?

Mr. PREISER. What did I say? "Coke in the mouse bottle"?

Senator KASTEN. "Coke in the mouse bottle." It might be tough to prove.

Mr. PREISER. In today's age, you might be able to do that. I am not sure. But, yes, the mouse in the Coke bottle.

The manufacturer would testify that. We have done everything we can. We have this machine, we put the Coke bottle through it, it washes it 100 times. What else can we do? That is true, what else can the manufacturer do? We still end up with the mouse in the bottle, and should a consumer recover or not? The answer has to be yes. That was really the genesis of strict liability, as such. It is not an insurance concept because you still have some defect. And the mouse in the Coke bottle would be a defect.

It took away some of the grave problems of proof the plaintiffs had. There was no way to show that the manufacturer was unreasonable in that Coke situation, but yet the consumer still should recover.

Senator KASTEN. I would like to thank all of the gentlemen on this panel. We would like to pursue some of these questions. We will do that in writing. There will be questions coming to you from members of the committee, the subcommittee staff. We would hope you could respond to those questions.

We would like to thank you all very much, particularly those who have traveled from great distances. We very much appreciate your testimony and your working with us today.

The next panel includes. Mr. Vermeer, Mr. Head, and Mr. Page.
[Recess.]

Senator KASTEN. The committee will come to order. The first witness on this panel is Ivan Brand.

Mr. FORD. Senator, it is William Ford, and Mr. Brand will speak under our timeframe.

Senator KASTEN. Excuse me, Mr. Ford.

STATEMENTS OF WILLIAM FORD, COALITION FOR UNIFORM PRODUCT LIABILITY LAW; IVAN BRAND, VERMEER MANUFACTURING CO.; PATRICK J. HEAD, BUSINESS ROUND TABLE; AND JOSEPH A. PAGE, GEORGETOWN UNIVERSITY LAW CENTER

Mr. FORD. Good morning, Mr. Chairman and members of the subcommittee. My name is William Ford, and I am a senior vice president and secretary of Colt Industries. I am testifying today as chairman of the Coalition for Uniform Product Liability Law. Accompanying me is Mr. Ivan Brand of Vermeer Manufacturing Co.

It is a pleasure for me to appear again before this panel, and I would request that my prepared remarks of last June¹ be incorporated into these proceedings, and a copy is attached for your convenience.

The coalition supports S. 44, the Product Liability Act, and urges you to proceed to mark it up as soon as possible. As this committee's report on S. 2361 indicated, a Federal product liability law is needed to remove uncertainty and to promote product stability and uniformity in the liability tort system. Any such proposal must be fair to manufacturers other product sellers, product users, our consumers and employees, and must equitably balance their competing concerns and the interests of society.

It must provide incentives so that the person in the best position to avoid injury can do so. It should not reward carelessness, and it must be efficient.

Legal fees alone have been estimated by this committee to equal \$7 for every \$6 received by injured persons. S. 44 goes a long way towards meeting these objectives. It does so without substantially changing the law now in effect in a number of States. For example, it clarifies that a manufacturer will be strictly liable only for injuries caused by defects in construction or by injuries resulting from a breach of the manufacturer's expressed warranty.

In those cases, however, when the plaintiff claims that the design was in some way deficient or that the warnings were insufficient, the manufacturer will be liable only if negligent. By codifying this scheme, S. 44 provides juries in each State with clear standards by which to determine manufacturer's liabilities. As a result, this aspect of S. 44 removes uncertainty and promotes greater stability and predictability.

Another feature of S. 44 which highlight's the bill's appropriate balancing of these areas of complete interest is the treatment of comparative responsibility. Nevertheless, we believe that S. 44 can be improved in a number of respects without conditioning our bill on acceptance of these changes. These are mentioned in my prepared remarks which have been submitted.

Let me take a moment to mention one of these punitive damages as it is a serious concern to many of our members. While S. 44 addresses this subject, we do not believe the bill goes far enough. Rather, we believe that a limitation on the amount of punitive damages is necessary, and that such limitation should take into account the size of the manufacturer.

¹ See hearing serial No. 97-109.

We would be pleased to work with you and your staff in developing further ideas as identified in our prepared statement.

Mr. Chairman, that concludes my remarks. I would like to call upon Mr. Brand, who is appearing on behalf of Mr. Vermeer, a man who built his company in one generation, so that Mr. Brand can explain the significant impact which product liability is having on his company as a representative small business.

[The statement follows.]

STATEMENT OF WILLIAM D. FORD, CHAIRMAN OF THE COALITION FOR UNIFORM
PRODUCT LIABILITY LAW

Good morning Mr. Chairman and Members of the Subcommittee. My name is William Ford, and I am a Senior Vice President and Secretary of Colt Industries Inc. I am testifying today as Chairman of the Coalition for Uniform Product Liability Law. Accompanying me is Mr. Ivan Brand, of Vermeer Manufacturing Company.

It is a pleasure for me to appear again before this panel, and I would request that my prepared remarks of last June be incorporated by reference into these proceedings. Our Coalition is an ad hoc group whose 140 members cover the entire spectrum of manufacturing endeavors, and whose 100 associate members represent virtually all facets of business activity.

The Coalition supports S. 44, The Product Liability Act, and urges you to proceed to mark-up as soon as possible.

Before asking Mr. Brand, who is appearing of behalf of Mr. Vermeer, a man who built his company in one generation, to explain the significant impact which product liability is having, I would like briefly to make several points.

As this Committee's Report on S. 2631 indicated, a federal product liability law is needed to remove uncertainty and to promote stability and uniformity in the product liability tort system. Any such proposal must be fair to manufacturers, other product sellers, product users or consumers, and employees and must equitably balance their competing concerns and the interests of society. It must provide incentives so that the person in the best position to avoid injury will do so—it should not reward carelessness. And it finally must be efficient so that transaction costs can be kept at a minimum. Legal fees alone have been estimated by this Committee to equal \$7 for every \$6 received by injured persons.

S. 44 goes a long way toward meeting these objectives. And it does so without substantially changing the law now in effect in a majority of states.

For example, it clarifies that a manufacturer will be strictly liable only for injuries caused by defect in construction or for injuries resulting from a breach of the manufacturer's express warranty. In those cases, however, where the plaintiff claims that the design was in some way deficient or that the warnings and instructions provided were insufficient, the manufacturer will be liable only if negligent.

By codifying this scheme, S. 44 provides juries in each state with clear standards by which to determine a manufacturer's liability. This is in contrast to current law in which this determination is made subjectively, since the common law provides the jury with little guidance on the appropriate standard to be applied.

As a result, this aspect of S. 44 removes uncertainty and promotes greater stability and predictability. Also this provision is fair to all concerned with product liability. It provides incentives to the manufacturer to use due care in product design and in making adequate warnings and instructions.

And another feature of S. 44 which highlights the bill's appropriate balancing of the various competing interests is its treatment of comparative responsibility. Rather than taking an all or nothing approach to liability, S. 44 imposes liability taking into account the conduct of the product user, the manufacturer, and others who may have contributed to the harm by apportioning responsibility among each. By so doing, the bill does not reward carelessness, and places responsibility on the person best able to avoid the harm.

Nonetheless, we believe that S. 44 can be improved in a number of respects. Without conditioning our support for the bill on acceptance of these changes, we would suggest amending the statute of repose to provide for a shorter and more definitive repose period applicable to all products (a topic covered extensively in my prior testimony); the inclusion of a defense for compliance with government standards and government contract specifications; the inclusion of a provision as to the sufficiency of expert testimony; the inclusion of a requirement that the product manufacturer be specifically identified; clarification of the rules concerning joint liability; and

amending the bill to ameliorate the uncertainty surrounding the current availability of punitive damages.

Let me take a moment to discuss briefly the punitive damage problem as it is a serious concern to many of our members. As Mr. Vermeer's statement reflects, insurers are unable to provide coverage against punitive damages. These damages, which are now routinely sought in product liability cases, are a potential threat to the continued existence to many smaller companies. Thankfully, most claims for punitive damages are not successful; but as Mr Vermeer states, he is "betting the keys" to his plant that he will prevail whenever such damages are claimed. Under current law, punitive damages are too open-ended.

Also, the availability of repetitive punitive damages for each product unit manufactured exacerbates these difficulties. Since only one course of conduct is involved, the permissibility of multiple awards of such damages is extremely unfair and potentially crippling to many manufacturers.

While S. 44 addresses these problems by transferring to the judge the function of assessing the question of the amount of punitive damages, we do not believe that the bill goes far enough. Rather, we believe that a limitation on the amount of punitive damages is necessary, and that such limitation should take into account the size of a manufacturer.

Alternatively, one of our members has recently suggested another means of dealing with this issue. Since punitive damages are designed to serve a public purpose—unlike compensatory damages which are intended to make the injured person whole—it might be appropriate to limit the recovery of punitive damages to one lawsuit, with the damages to be applied to a public purpose, rather than to provide a windfall to a particular claimant.

We would be pleased to work with your staff in developing appropriate language to deal with punitive damages and any of our other suggestions.

Finally, I understand that S. 44 has the support of the entire business community, and some consumer groups. I further understand that the only opposition to this bill comes from several other consumer groups and from some members of the legal community whose primary interest is in negligence litigation. However, I am pleased to point out that while the American Bar Association has been opposed to federal standards in the past, most recently that same association has come out in support of a federal solution to the problem caused by mass torts. It should also be noted that the March, 1983, issue of the American Bar Association Journal included the results of a survey of the ABA membership by a professional pollster. Significantly, 49 percent of those polled favored "enactment of federal liability legislation superseding state law," while only 43 percent were opposed. Thus, I think it perhaps important to recognize how far the ABA has come on this issue.

Mr. Chairman, that concludes my remarks. I would like to call upon Mr. Brand to present the balance of the Coalition's testimony.

[The following information was subsequently received for the record:]

COALITION FOR UNIFORM PRODUCT LIABILITY LAW,
Washington, D.C., April 27, 1983.

HON. ROBERT KASTEN, Jr.,

Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: At the April 6 hearing, a suggestion was made that since product liability insurance premiums have leveled off in recent years, the need for federal tort legislation is not as severe as many believe. Such reasoning, however, is extremely misleading as it ignores entirely the increasing trend in which each premium dollar is buying less and less insurance protection. This decline in insurance protection is evidenced in a variety of ways.

First, in contrast to former practice, product liability insurance is frequently being written with substantial deductibles or retentions. For example, Mr. Brand's prepared testimony indicates that Vermeer Manufacturing Company maintained first dollar coverage until 1979, at which time it was required to assume a deductible of \$1 million. Thus, a comparison of product liability premiums over time is meaningless unless the payments made on account of deductibles and retentions are also taken into account.

Second, the scope of coverage has also been decreasing. For example, Colt's product liability insurance policy now requires us to pay all attorneys' fees, in marked contrast to over coverage several years ago wherein our insurer paid these fees.

And even without regard to the treatment of attorneys fees, insurers currently are reducing coverage by excluding products that may prove troublesome. These

specific exclusions are in addition to those exclusions routinely made for coverage claims from certain environmental injuries and from injuries resulting from nuclear products. And of course, punitive damages are also denied coverage in most jurisdictions.

It is thus apparent that because of the trend to provide less and less insurance protection, statements suggesting that insurance premiums have leveled off are misleading. Rather, real insurance costs have increased because each premium dollar is purchasing less coverage.

But the experience of the last several years in this regard is modest compared with that which is likely to occur. The financial press has amply recounted how, in recent years, the insurance industry has been willing to write policies at underwriting losses, looking toward high interest rates from investments to provide the necessary supplemental funds with which to satisfy their claims. As the available rate of investment return subsidies, insurance premiums—including product liability insurance premiums—will inevitably spiral again.

All of this is evidence of the immediate need for S. 44, which restores certainty and predictability to the substantive law of product liability. As a result, a true stabilization—if not reduction—of product liability insurance costs can occur.

Thank you for your efforts in this important matter.

Sincerely,

WILLIAM D. FORD, *Chairman.*

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. In light of the fact that the bill would require the state courts to interpret terms and apply legal standards with which they may be unfamiliar, and in light of the fact that many states appear to have well-settled liability rules which the bill may very well disrupt, how do you believe that the bill will achieve its stated goal of uniformity? What effect will the initial, and perhaps lengthy period, of new interpretation have on transaction costs? Are there any studies or statistics which show how much in transaction costs would be saved if uniform standards were imposed?

Answer. The product liability laws of individual states, far from being well-settled, are changing continually. This unstable situation results in part because product liability is a concept of relatively recent vintage: The first contemporary product liability case was decided twenty years ago in California. Since the major portion of product liability law is contained in the common law—the body of law found in legal opinions—the law applicable in a particular state is often unclear because the courts of that state have not yet had occasion to consider the precise issue involved. And because the law is judge made, it is susceptible to change at any time the courts deem appropriate. As a result, current product liability law continues to be in a state of flux.

If the Product Liability Act is adopted, it would substantially reduce the uncertainty and transaction costs characteristic of present law. While there may be an initial period during which courts grapple with problems in its interpretation, this is not unusual, but is attendant to the enactment of any uniform law. For example, noval questions continue to arise under the Uniform Commercial Code despite that law's initial promulgation in 1962.

As the Chairman of this Subcommittee has previously indicated, the transaction costs under current law are significant: Lawyers—both plaintiff lawyers and defense lawyers—now receive fifty-four cents out of every dollar paid on account of product liability claims (i.e., seven dollars to lawyers for every six dollars to injured plaintiffs.)

It is not surprising that legal fees are so high. Plaintiff attorneys are forever seeking the adoption of new and noval product liability theories. While sometimes these theories have been adopted by only one or two states, in other cases they have yet to be accepted anywhere. The only limitation on the legal theories that may be argued as applicable is that imposed by the attorney's imagination. But arguing, briefing, and appealing the applicability of these noval theories is not without substantial costs—which is why legal fees exceed the payments received by injured parties.

With a federal product liability law, the legal theories potentially applicable to any product liability litigation would be limited to those provided by the statute. While courts will be forced to construe specific provisions in the statute until definitive interpretations are reached, it is obvious that the extent of the uncertainty in such cases will be substantially reduced.

And of course, once the product liability statute has had time to be interpreted, transaction costs should fall off substantially. While it is impossible to quantify this anticipated cost reduction, such statute will provide much needed clarity.

Question. Can you point to any specific instances where product liability insurance costs, product liability judgments, or any aspects of the tort litigation system have caused a business to discontinue a product line? If so, could you provide as much information as possible about the decision to discontinue including the name of the firm, the type of product discontinued, the year the product line was discontinued, the specific reasons the firm stated at the time as the basis for the decision to discontinue, the number of injuries caused by the product line, the number of claims made as a result of such injuries, the number of product liability lawsuits brought against the firm because of such injuries, the number and size of judgments in favor of the plaintiff in such lawsuits? Can you provide any studies or statistics which support the contention that product liability insurance costs, product liability judgments, or uncertainties in the tort litigation system have caused businesses to discontinue a product line?

Answer. Many businesses that have discontinued product lines as a result of the current product liability system are loathe to provide publicly detailed information on their decisions, for fear of attracting even more product liability litigation.

Despite this lack of particulars, the record before the Subcommittee confirms that this is occurring. For example, at Subcommittee hearings on June 30, 1982, Ms. Maria Dennison of The Sporting Goods Manufacturers Association testified:

"Out of the 13 football helmet manufacturers, 7 remain in business. Of these 7, only 1 company has publicly stated that they will remain in business thru 'thick and thin.'"

We have no doubt that many other manufacturers in a variety of industries are in a comparable situation.

Question. Could you provide any statistics, studies, or references to studies which indicate whether the Risk Retention Act of 1981 has led to a decrease in product liability insurance costs?

Answer. There has been virtually no experience to date under the Risk Retention Act of 1981. Business Insurance magazine, which attempted several months ago to determine the number of risk retention groups that have been formed under that Act, was able to identify only one. And in that case, state regulators were taking the position that it was not a valid group. Thus, it is doubtful that the Risk Retention Act of 1981 has had any impact on insurance rates.

Nevertheless, Insurance Service Office (which sets nationally applicable product liability insurance rates for most of the property-casualty insurance industry) indicates that actuarially computed product liability rates have declined slightly since the late 1970's. Actuarial rates, however, account for only about ten percent of the total product liability insurance premium volume. The remaining ninety percent is derived from judgment rates—rates based upon the exercise of underwriting judgment. While these judgment rates have been "soft" in recent years, it is not because of the Risk Retention Act.

The financial media has amply recounted how, since 1981, the property and casualty insurance industry has been writing commercial insurance, including product liability coverage, at substantial underwriting losses. These losses, however, have been recouped by the insurers via double-digit interest rates available on investments. Thus, high interest rates have played a substantial factor in the pricing of product liability insurance.

But high interest rates are not the only factor that would tend to reduce the price of product liability insurance coverage. Insurers are also providing increasingly less insurance protection for the same product liability premium dollar. This comes about in a variety of ways.

First, product liability insurance is frequently being written with substantial deductibles or retentions, in contrast to former practice. For example, Mr. Ivan Brand who testified before the Subcommittee on April 6, 1983, indicated that his company, Vermeer Manufacturing Company, maintained first dollar coverage until 1979, at which time it was required to assume a deductible of one million dollars. Thus, a comparison of product liability premiums over time is meaningless unless the payments made on account of deductibles and retentions are also taken into account.

Additionally, the scope of coverage has been decreasing. For example, the product liability policies of many companies now require them to pay all attorneys' fees, in marked contrast to their coverage several years ago wherein the insurers paid these fees.

These reductions in coverage are in addition to the specific exclusions routinely made for certain environmental injuries and for injuries resulting from nuclear products. And of course, punitive damages are also denied coverage in most jurisdictions.

Thus, independent of the adoption of the Risk Retention Act, whatever price reduction that has come about is attributable to the availability of increased investment returns and reductions in the extent of product liability coverage.

Question. If you consider national uniformity the principal reason why a federal cause of action for products liability is desirable, then would you support federal enactment of Restatement (Second) of Torts § 402A, which is already law in about two-thirds of the states? Why or why not?

Answer. We believe that S. 44 embodies to a substantial extent the principles initially articulated in Section 402A of the Restatement (Second) of Torts. Section 402A provides, in relevant part, that a manufacturer "who sells any product in a defective condition unreasonably dangerous . . . is subject to liability . . . [despite] the seller[s] exercise of] all possible care in the preparation and sale of his product. . . ."

As is clear from the comments accompanying this section, its drafters initially intended it to apply only to defects in construction (i.e., where the product failed to conform to the manufacturer's own specifications). Under Section 402A, a manufacturer is strictly liable for defects in construction; the manufacturer's conduct is irrelevant. And under S. 44, a manufacturer continues to be strictly liable for defects in construction, regardless of its conduct.

In recent years, however, courts have attempted to apply Section 402A to cases involving design defects or instances of failure to provide adequate warnings or instructions. But Section 402A does not easily lend itself to such cases. In these cases, unlike those involving construction defects, the product was designed and the warnings were provided exactly as the manufacturer intended. To apply strict liability—and to ignore the manufacturer's conduct—would provide inequitable results. For example, if a plaintiff's injury could have been prevented by the use of an alternative design that would have increased the likelihood of another kind of injury and reduced the overall safety of a product, the manufacturer should not be liable for having used the particular design.

As a result, the majority of courts applying Section 402A have read the expression "defective condition unreasonably dangerous" to require proof of some type of negligence on the part of the manufacturer. Thus, absent some culpability on the part of the manufacturer, the courts in these states would not find a manufacturer liable for design defects or failures to provide adequate warnings or instructions.

A few courts, however, now make a determination on whether a product was defective in design or because adequate warnings or instructions were not provided solely by reference to the product, and without regard to the manufacturer's conduct. Such an interpretation of Section 402A is contrary to the intent of its drafters and has the effect of holding the manufacturer liable as an insurer against all harms caused by the product.

S. 44 amplifies the concept of "defective condition unreasonably dangerous." In those cases where design defects or failures to warn or instruct are alleged, it provides for a negligence standard. And where construction defects are alleged, it provides for strict liability. We believe that this approach is consonant with both the literal language of Section 402A as well as its underlying intent. *See also* response to Questions 6 and 8, *infra*.

In all events, Section 402A addresses only a portion of the uncertainty and inequity resulting from current product liability law. Other areas requiring clarification and uniformity include comparative responsibility, the treatment of the intersection of the product liability system and the workers' compensation system, the exposure of product sellers to liability for a potentially unlimited duration, and the lack of clear guidance as to when punitive damages may be awarded. These areas are all addressed in S. 44.

Question. S. 44 excludes recovery for mental distress in the absence of physical harm. If a plaintiff can prove that he suffered severe mental disturbance as the result of witnessing a family member being killed by a defective product, do you think he should recover? Why or why not? Would your answer be the same if he proved that the defect had resulted from the defendant's negligence, or from the defendant's reckless disregard for the safety of persons who might be injured by the product? Why or why not?

Answer. We believe that S. 44 correctly excludes recovery for mental distress in the absence of physical harm.

Any product that proves to be defective is likely to cause some modicum of mental distress. But in most instances, this mental distress will be relatively insubstantial. For example, a defective television—which breaks down harming no one—will undoubtedly cause many sports affectionados mental distress at their inability to view weekend football. This and other forms of mental distress ought to be noncompensable. In this regard, Dean Prosser has noted that absent physical injuries, mental distress might be easily “counterfeited” and is otherwise “evanescent.”

By requiring a physical injury to occur as a precondition to allowing compensation for purely mental distress, S. 44 mitigates the possibility of the multitude of trivial, evanescent, or counterfeit claims that would otherwise result.

In providing for this result, the question correctly notes that S. 44 bars recovery for a mental disturbance that results from viewing a family member killed by a defective product. Despite the suggestion implicit in the question that such result represents a radical departure from existing law, it is precisely the result that would obtain in the vast majority of states today.

Question. S. 44 adopts a negligence standard in design defect cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. Strict liability and negligence can easily be differentiated in design defect cases.

Where strict liability is applied to such cases, the trier-of-fact considers only the product—the manufacturer’s conduct would be irrelevant. Thus, despite a manufacturer’s exercising all reasonable care in the design of the product, it would be liable for injuries resulting from a product that was determined to be defective.

A negligence standard, however, would require the trier-of-fact to consider both the product and the manufacturer’s conduct. Under a negligence theory, the trier-of-fact would be required to find not only that the product was defective, but also that the manufacturer was negligent.

We believe that S. 44 properly applies a negligence standard to cases involving a design defect.

In such cases, the manufacturer has made a conscious decision to utilize a particular design. And in so doing, a manufacturer has implicitly or explicitly rejected alternative designs. While some of these might, in fact, have prevented a plaintiff’s harm, they may well have increased the likelihood or seriousness of another kind of injury. Moreover, in choosing a particular design, the manufacturer considered non-safety factors as well. One commentator has illustrated these as follows:

“He must consider cost: some designs, however safe, are simply too expensive to be marketable—e.g., a crash-proof car that costs \$1 million a unit to build. He must consider efficiency: a crashproof car with a maximum speed of three miles per hour is of little use.”

Unless a manufacturer is to be held absolutely liable as an insurer for injuries caused by its product, some balancing of the competing concerns in its decision to utilize a particular design must be made. By providing a negligence standard, S. 44 provides a means for appropriately determining a manufacturer’s liability in such cases. See also response to Question 4, *supra*.

Question. S. 44 provides that a product is not unreasonably dangerous in design if its dangerous aspect could not “have been eliminated without seriously impairing the . . . desirability, economic or otherwise, of the product to the person who uses or consumes it?” Would this provision permit dangerous products to be sold where a safer design had been available but where implementation of such a design would have raised the price of the product substantially (but not enough to price it out of the market)? If it would, is this desirable? Why or why not?

Answer. Under S. 44, the trier-of-fact must determine whether the economic desirability of a product is seriously impaired by the cost of eliminating a dangerous aspect. The question, which indicates that the price of the product would be raised substantially (but not enough to price it out of the market), suggests to us that the economic desirability of the product would not have been seriously impaired by the elimination of the design defect. Thus, if the trier-of-fact resolves the issues in the manner posited by the question, the product would be found to be unreasonably dangerous.

We believe that, as a precondition to a manufacturer’s liability for failing to eliminate a dangerous aspect of a product, the trier-of-fact must conclude that the costs of eliminating the dangerous aspect would not seriously impair the economic desirability of a product. Virtually all products can be made safer at an increased cost. But at some point, the costs of providing additional safety features will make the product unattractive to its purchasers. Thus, the inquiry as to whether that point was reached—i.e., whether the cost of eliminating the dangerous aspect would

impair the economic desirability—is appropriately a factual question that must be resolved against the manufacturer as a precondition to its liability.

Question. S. 44 adopts a negligence standard in failure to warn cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. Strict liability and negligence can easily be differentiated in cases of failure to warn or instruct.

Where strict liability is applied to such cases, the trier-of-fact considers only the adequacy of the warnings and instructions accompanying it—the manufacturer's conduct in promulgating these warnings or instructions would be irrelevant. Where a negligence standard applies, the trier-of-fact considers both the adequacy of the warnings and instructions and the manufacturer's conduct.

For example, consider a situation where a manufacturer failed to provide warnings about a danger that was scientifically unknowable when it made the product. Under a negligence standard, if the manufacturer's product testing was found reasonable, the manufacturer would have no liability. But if strict liability is applied, the focus is only on the warnings or instructions. Under strict liability, the product may be considered defective with the benefit of all scientific learning that occurred since the time of manufacturer—and the manufacturer's product testing prior to manufacturer is ignored.

Similarly, if a manufacturer provides warnings about every conceivable way in which a given product may be misused, the resulting multi-page brochure will likely be ignored. By warning of only the most likely or serious hazards, however, the manufacturer is able to communicate effectively the key risks and have those warnings understood.

Unless a manufacturer is to be held absolutely liable as an insurer for injuries caused by its product, its conduct in promulgating specific warnings and instructions must be taken into account. By providing a negligence standard, S. 44 provides a means for appropriately determining a manufacturer's liability in such cases. See also response to Question 4, *supra*.

Question. If S. 44 is enacted, do you think many injured parties who could otherwise prove their case would be barred by the 25 year limitation? Do you think S. 44, as written, would leave the states free to enforce a period of limitations beginning on the date of first sale in manufacturing defect or breach of express warranty cases? Should S. 44 allow states to do this? Why or why not?

Answer. The 25 year statute of repose provided by S. 44 will affect few, if any injured parties. The 1977 study by the Insurance Services Office (ISO), which considered approximately 24,000 product liability claims that were settled or finally adjudicated, indicates that less than 1% of one percent of all persons injured by a product sustain their injuries more than 15 years after the date the product was first purchased. While the ISO study did not differentiate among claims that occurred more than 15 years after the date the product was first purchased, intuitively we would suspect that the number of those claims occurring more than 25 years after first purchase are substantially less than 1% of one percent.

Moreover, because S. 44's statute of repose is applicable only to capital goods and contains further exceptions for delayed manifestation of harm, latent defects, and fraud and misrepresentation, we believe that few, if any, injured persons would be foreclosed from suit by this provision.

Also, we do not believe that S. 44, as written, would permit a state to enforce a period of limitations with respect to a capital good in the case of an alleged manufacturing defect or breach of express warranty. We interpret the preemption of state law provided by S. 44 to be effective to preclude the enforcement of such limitation.

Question. Why do punitive damages present a special problem in product liability tort actions?

Would you please explain the purposes of punitive damages? If the purpose is to punish the defendant and is not to compensate the plaintiff, why should punitive damages go to the plaintiff? Wouldn't the punitive purpose and the public interest be served by giving the punitive damage award to a charitable organization or a research group?

Do you believe that a problem of overpunishment arises when a manufacturer must pay punitive damages in multiple actions for the same wrongful conduct? Explain.

Answer. Punitive damages present a unique problem in the area of product liability. While until several years ago such damages were rarely sought in a product liability action, they are now invariably claimed in such suits filed today.

A claim of punitive damages in a product liability action enables the plaintiff to introduce at trial otherwise inadmissible evidence that often is highly prejudicial to the defendant. Such evidence could include, for example, proof as to the net worth of the defendant.

Also, many manufacturers are exposed to multiple punitive damage awards. While any single award of punitive damages, by itself, might be appropriate, the cumulative effect of multiple punitive damage awards (potentially available to each and every person who used the product) excessively punishes the manufacturer.

In this regard, it is important to recognize that the purpose of punitive damages is societal, rather than private. Punitive damages are intended to express society's outrage over the defendant's conduct, and are more similar to fines than to compensatory damages. As a result, we agree entirely with the question's suggestion that it may be appropriate for punitive damages to be awarded to a public, rather than a private interest, and believe that this is a suggestion worth pursuing.

QUESTIONS OF SENATOR HEFLIN AND THE ANSWERS THERETO

Question. One of the reasons we are considering preempting state standards of liability is the claim on the part of many manufacturers that the state tort litigation system has produced unnecessarily high insurance costs. In July of 1981, *Business Insurance* magazine reported, and I quote, "Product liability insurance premiums have leveled off or plunged during the last three years." Do you agree that product liability insurance costs have decreased recently?

If yes, doesn't this eliminate one of, if not the, primary justification for the imposition of federal product liability standards?

If no, I would greatly appreciate receiving the most current evidence about product liability insurance costs. Could you provide a report on the issue?

Answer. While product liability insurance costs continue to remain relatively stable, they are nevertheless exponentially higher than they were several years ago. But the reason for this current stability has little to do with product liability, the exposure for which continues to increase as new theories of liability are judicially adopted.

The statement quoted from *Business Insurance* was made in July 1981, and covered a period during which interest rates reached record levels. During that period, many insurers were writing coverage at an underwriting loss in order to generate cash flow on which these extraordinary interest rates could be earned. Despite the decline in interest rates from their peak, they continue to remain at relatively high levels. And to the best of our knowledge, insurers are continuing to write product liability insurance at an underwriting loss.

But focusing on merely the amount charged for product liability insurance masks the fact that the product liability insurance premium dollar now buys less protection than it did several years ago. As we described in our response to question 3 of our May 31, 1983, submission, this reduction in protection has come about in at least two ways: (1) increases in deductibles and retentions; and (2) decreases in the scope of coverage by policy exclusions. Thus, while product liability insurance costs may ostensibly appear stable, it is likely that they have in fact increased since less protection is provided for the same premium. But because of the way in which these increases have occurred, it is difficult, if not impossible, to quantify their magnitude.

Moreover, many product sellers self-insure all or a portion of their product liability costs. And to the extent that these product sellers directly pay claims, attorneys fees, and related expenses, these costs escape the insurance mechanism altogether and not reflected in insurance costs. Thus, by considering only insurance costs, one would be ignoring a substantial part of the overall costs of the product liability system.

Question. In 1981, we passed the Risk Retention Act in order to decrease insurance costs. I recognize that there are many aspects of the product liability issue, but shouldn't we allow the Risk Retention Act to work before undertaking as drastic a measure as the preemption of state tort law? Do you have any information about the effect the Risk Retention Act has had so far? Could you provide us with such information?

Answer. In response to question 3 or our May 31, 1983, submission, we indicated that there has been virtually no experience to date under the Risk Retention Act of 1981. *Business Insurance*, which attempted several months ago to determine the number of risk retention groups that have been formed under the Act, was able to identify only one. And in that case, state regulators were taking the position that it

was not a valid group. Thus, to date, it would be safe to assume the the Risk Retention Act has had no effect whatsoever on product liability insurance costs.

Moreover, the Risk Retention Act was not intended to deal with the problem of high product liability insurance costs; rather, it was directed at the problem of unreasonably high product liability insurance costs. Because most product liability insurance premiums are judgment-based (i.e., they are not actuarially determined), proponents of the Risk Retention Act believed—and presumably continue to believe—that in some instances, insurers charge product liability premiums in excess of those warranted by the risk insured. Thus, it was hoped that in such instances, risk retention groups could provide an alternative to the insurance available in the commercial marketplace. But because the courts of several states continue to interpret product liability tort law expansively, even were such groups formed, they would be forced to charge ever-increasing product liability insurance premiums in order to keep abreast of their increasing exposure.

Question. I am unaware of any act of Congress that establishes federal tort standards which are enforceable exclusively in the state courts. I know that the Federal employees [sic] Liability Act preempts state tort law but that act creates concurrent federal and state jurisdiction. Also, until two years ago, there was no federal question jurisdiction for cases involving less than \$10,000, but that jurisdiction statute did not involve the preemption of a specific area of law traditionally left to the states. Are you aware of any statutes which preempt state tort law but which refuse to allow the federally-created standards to be enforceable concurrently in federal courts?

Answer. The question correctly notes that no federal statute has ever been enacted which preempted state tort law without providing the federal courts with federal question jurisdiction.

Nevertheless, claims based on the Product Liability Act could be enforced in federal court in those cases where there is an independent basis for federal jurisdiction (e.g., diversity). In reprotog S. 2631—the predecessor to S. 44—during the last Congress, the Senate Committee on Commerce, Science and Transportation indicated as a reason for this jurisdictional scheme the desire to “avoid increasing the case load for the Federal courts.” Many in the legal and judicial community believe that this is an important concern.

Moreover, while it may be true that in the past there has been no federal statute preempting state tort law which was enforceable only in state courts absent an independent basis for federal jurisdiction, there have been instances outside of the tort area in which federal statutes conferred rights that were enforceable solely in state courts. And these statutes have been upheld by the Supreme Court of the United States as constitutional.

For example, in *Shoshone Mining Company v. Rutter*, 177 U.S. 505 (1900), the Supreme Court considered a federal statute which provided that an adverse claimant to a mining patent in federal lands “should commence proceedings ‘in a court of competent jurisdiction’”. *Id.* at 506. Absent an independent basis for federal jurisdiction, rights under this federal statute were adjudicable only in state courts. Suit was brought in federal court, despite the lack of an independent basis for federal jurisdiction. In the Supreme Court, the plaintiff claimed that the federal court was required to entertain jurisdiction. The Supreme Court held that federal courts lacked jurisdiction to consider claims under this statute, and remanded the proceeding to state court. See also *Blackburn v. Portland Gold Mining Company*, 175 U.S. 571 (1900).

While in recent years, many federal statutes confer jurisdiction on both federal and state courts, *Shoshone Mining Company* indicates that Congress may properly create rights enforceable in state courts alone.

Moreover, since *Shoshone Mining Company*, the Supreme Court has determined that state courts are constitutionally required to hear disputes under federal laws. In *Mondou v. New York, New Haven & Hartford Railroad Company*, 223 U.S. (1912) the Supreme Court of Errors of Connecticut had held that its state courts of general jurisdiction were not required to adjudicate disputes under the Federal Employer's Liability Act (which Congress made enforceable in both state or federal courts), because it was inconsistent with Connecticut's public policy, and otherwise “inconvenient.” The Supreme Court flatly rejected this view, stating in relevant part:

“[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudica-

tion according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion' because we are advised . . . that the Superior Courts of [Connecticut] are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery. . . .

"The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power conferred to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected accordingly in the courts of the State."—*Id.* at 56-57. This rationale is not dependent upon a concurrent grant of jurisdiction to federal courts and state courts, but is applicable to instances where only state courts are involved. See also *Testa v. Katt*, 330 U.S. 386 (1947).

We thus fail to understand the validity of the premise underlying the question, since the creation of federal rights may be undertaken without conferring jurisdiction on federal courts to enforce such rights.

Mr. BRAND. Mr. Chairman, good morning. My name is Ivan Brand. I work for Vermeer Manufacturing Co.

I am appearing before you today on behalf of Gary Vermeer, who is the chairman of the board of our company and the original founder of our company. Like you, I am not an attorney. However, I believe that I have a very special perspective to bring to you this morning concerning the problem of product liability.

Let me tell you a little bit about Vermeer Manufacturing Co. This company was founded by Gary Vermeer in 1949. The company is located near a small town in the midst of a rural community in central Iowa. Prior to founding the company, Gary Vermeer was a very innovative farmer. Back then, Mr. Vermeer was always looking for ways to make the farming operation more efficient, and he fashioned a variety of devices for use on his own farm which were substantial improvements over equipment then available.

His neighbors, upon seeing that there was a better way of doing things, asked him to build similar devices for him, and before too long, Mr. Vermeer was spending most of his time not on farming but rather on making equipment for other farmers.

To make a long story short, Mr. Vermeer finally began to devote almost all of his time to manufacturing products, and therefore formed Vermeer Manufacturing Co. When the company was formed, there was one other employee besides Mr. Vermeer. Today we have over 600 employees. The single principle underlying the company's formation, that there was a better way of doing things, has continued for the past 34 years.

While our concern over product safety has existed from the very beginning, our concern over product liability is a relatively recent development. In fact, until the early 1970's, our company had very little firsthand experience with product liability.

It might now be helpful to mention our product liability experience, which definitely affects the way we perceive this problem. Until 1979, our company maintained first dollar coverage for

claims made against it. However, since 1979, we have been only able to obtain insurance carrying a substantial deductible.

Presently, we are essentially self-insured for the first \$1 million, and for a company our size, a layout of \$1 million is a great deal of expenditure. This type of experience insurance coverage has a very major impact on a company's well-being. The situation is tolerable, however, when compared to the problem that might be caused by punitive damages. As a result of public policy, some insurers claim they are unable to provide coverage against punitive damages. Punitive damages, which were generally not sought in our earlier product liability cases, are now somewhat routinely claimed in lawsuits filed against us.

Since these damages far exceed whatever compensatory damages are allowed, we are literally in some cases betting the keys to our company that we will prevail in those cases. By limiting punitive damages to the most outrageous cases of misconduct, it is made more bearable, but the limitation on punitive damage that takes our size into account would be even more helpful.

Furthermore, by providing a windfall for a particular individual plaintiff, perhaps punitive damages should be awarded for a public purpose.

In this connection, let me emphasize that Vermeer Manufacturing Co. is extremely concerned with our product safety, and we have never been found liable for punitive damage. We have a product safety department devoted to insuring that our products are indeed safe. In some instances, reports of accidents have led our people to go back and incorporate design improvements which can be made in the product to avoid similar harm.

Senator KASTEN. Mr. Brand, I will have to ask you to summarize the conclusion of your remarks.

Mr. BRAND. It bears mention at this point that the bill's treatment of subsequent remedial measures is helpful to us, because we know when we make such changes they may come back to haunt us in the courtroom where we are engaged in defending a product where that subsequent modification was made.

Mr. Chairman, on behalf of Vermeer Manufacturing Co. and the Coalition for Uniform Product Liability Law, I sincerely thank you for your efforts and urge you to go forward expeditiously with the law.

[The statement follows:]

STATEMENT OF IVAN BRAND, PRODUCT SAFETY DIRECTOR VERMEER MANUFACTURING COMPANY

Good morning Mr. Chairman and Members of the Subcommittee. My name is Ivan Brand, and I am Product Safety Director of Vermeer Manufacturing Company and a member of the Coalition for Uniform Product Liability Law. I am appearing before you today on behalf of Gary Vermeer, who is Chairman of the Board of our company.

As Mr. Ford indicated, the Coalition supports S. 44, the Product Liability Act, and urges you to proceed to mark-up as soon as possible. While it appeared to many that an adequate record supporting this legislation had been made during the last Congress (including this Committee's superb Report on S. 2631 explaining the need for, and legal authorities of, each provision in the bill), apparently these hearings suggest that some still doubt the urgent need for a federal product liability law.

Perhaps if the problem is approached from my perspective, which is somewhat different from most of the other witnesses who have testified, those who have yet to

make up their mind may come to appreciate why this legislation is extremely important.

I wish now to explain briefly how the Vermeer Manufacturing Company came to be. This company was founded by our Chairman of the Board, Gary Vermeer, in 1949. Prior to that time, Gary Vermeer's career consisted entirely of farming. Back then, Gary was always looking for ways to make farming more efficient and had fashioned a variety of devices for use on his own farm that were substantial improvements over the equipment then available. His neighbors, upon seeing that there was a better way of doing things, asked him to build similar devices for them. And before too long, Gary was spending most of his time, not on farming, but rather on making equipment for other farmers.

To make a long story short, Gary finally began to devote almost all of his time to manufacturing products and therefore formed Vermeer Manufacturing Company. When the company was formed there was one other employee besides Mr. Vermeer. Today we have over 600 employees. The single principle underlying the company's formation—that there is a better way of doing things—has continued for the past 34 years.

While our concern over product safety has existed from the very beginning, our concern over product liability is a relatively recent development. In fact, until the early 1970's, our company had very little first-hand knowledge about product liability.

Before getting into the types of claims that we have seen, it may be helpful to mention our product liability insurance experience, which also definitely affects the way we perceive the problem. Until 1979, our company maintained first dollar coverage for claims against it. However, since 1979, we have only been able to obtain insurance carrying a substantial deductible. Presently, we are essentially self-insured for the first \$1 million. With this type of insurance coverage a significant claims experience in any year would have a very major impact on the company's financial well-being.

This situation is tolerable when compared with the problem that might be caused by punitive damages. As a result of public policy, some insurers claim that they are unable to provide coverage against punitive damages. And punitive damages, which were generally not sought in our earlier product liability cases, now are routinely claimed in lawsuits filed against us. Since these damages sometimes far exceed whatever compensatory damages are allowed, we are literally betting the keys to our company that we will prevail in such cases.

By clearly limiting punitive damages to the most outrageous instances of misconduct, S. 44 makes this bad situation more bearable. But we believe that an aggregate limitation on punitive damages that takes our size into account would be even more helpful.

In this connection let me emphasize that Vermeer Manufacturing Company is extremely concerned with our product safety and has never been found liable for punitive damages. We have a whole product safety department devoted to assuring that our products are indeed safe. In some instances, reports of accidents have led our people to go back and incorporate desing improvements which can be made in the product to avoid similar harm.

It bears mentioning at this point that the bill's treatment of subsequent remedial measures is extremely helpful to us. Because under present law subsequent design changes can often be introduced into evidence, not only must we in the safety department consider possible product improvements, but it may also be necessary to involve our lawyers in that process. When subsequent product improvements are made, we live under the threat that such modifications may adversely affect pending and potential litigation. It is indeed a sorry system that provides disincentives to a manufacturer to make warranted changes. Section 14 of your bill, Mr. Chairman, would enable us to make these changes free from doubt that they may come back to haunt us in the future. I have a very deep concern that some companies with less dedication to product safety may refrain from making necessary product improvements because of this very threat.

Let me now give you some idea of the types of claims that have been made against us. We manufacture a hay baler powered by a farm tractor. Essentially, these balers operate by intaking hay through the front and then rolling the hay into round bales weighing approximately 1,000 pounds or more. In one case that we were involved in, an operator caught his arm in the intake portion of the hay baler, and we were sued for failing to provide adequate warnings, failure to provide adequate guards, failure to produce emergency stops, and so forth.

Mr. Chairman, it is our belief that this hay baler is indeed a safe product. There were guards on the product; there were warning decals on the product; and there

were warning in the instruction manual accompanying the product. But apart from all that, it takes an extremely careless act to place your hand or body in the vicinity of the baler intake component without turning the tractor off. There is absolutely no operation of the baler that would require this. And we do not believe that the installation of any additional guards, emergency stops, or other devices would have any beneficial effect on the safety of the product. Well, we went to court on this one, and thankfully, the jury agreed with us.

We've had claims on account of another product that we manufacture—a trencher. A trencher is a device which, not surprisingly, digs trenches for pipes, underground cables, and so forth. It is powered by a 4 wheel-drive tractor, also manufactured by Vermeer, and via a chain line to which cups are attached, the trencher claws earth out of the ground. In this case, the operator claims to have left the operator's seat while the tractor engine was running and somehow managed to get run over. Of course, we have been sued for this accident and the claim is that the product is somehow defective in design. We have been sued even though I believe that we can show beyond any doubt that the plaintiff's account of the accident is grossly, and possibly intentionally, inaccurate. Again, we believe that our trencher is a safe product and that the cause of this accident was that the plaintiff intentionally and unnecessarily engaged himself in reckless actions which resulted in the happening of this accident. Nevertheless, a great amount of money and time is presently being devoted to the defense of this lawsuit.

Hopefully, cases like the two I just mentioned could be avoided or made more manageable under S. 44. By the bill's requiring a condition for liability that a manufacturer be negligent either in failing to provide adequate warnings or in designing the product, suits such as those described would be less attractive to claimants.

Mr. Chairman, I can go on and on explaining how your bill would be a major improvement to the fairness of the law in the types of claims we have seen. Rather than doing this, I would like merely to address one other feature of your bill which I think underscores its fundamental fairness—and that is the comparative responsibility provisions. Rather than taking a black and white approach to the liability or the lack thereof, the bill attempts to balance the conduct of the product user, the manufacturer and others who may have contributed to the harm and apportions the responsibility among each. Not only is this principle fair as between the manufacturer and the product user, but it is fair also among defendants.

For example, our company often uses component parts manufactured by others. In one such case, the component part, while being used for its intended purpose, malfunctioned as the product was being used. After extensive discovery, we finally arrived at the point where a decision needed to be made concerning settlement. We were advised by legal counsel that under the law of that jurisdiction, we had no claim for contribution or indemnity against the component manufacturer. Further, the applicable law held that the two defendants would be held jointly liable and that each of us would pay 50 percent of the claimant's damages—even though they were very confident that we could show that a vast majority of the fault would be that of the component manufacturer. They felt that it would be very difficult to convince the jury that Vermeer Manufacturing Company was even less than one percent responsible. We, therefore, decided that we would participate equally with the component manufacturer to settle the lawsuit. Had the comparative responsibility provision in S. 44 been in effect, the component manufacturer would have been found liable for the full extent of its responsibility.

Mr. Chairman, on behalf of Vermeer Manufacturing Company and the Coalition for Uniform Product Liability Law, I thank you sincerely for your efforts thus far and urge you to go forward expeditiously with S. 44.

At this time, Mr. Ford and I would be pleased to attempt to answer any questions that you may have.

Senator KASTEN. Mr. Brand, thank you.

Mr. Ford, thank you.

Mr. Patrick J. Head, representing the Business Roundtable, also the vice president and general counsel of FMC Corp. Mr. Head.

Mr. HEAD. My name is Patrick Head. I represent the lawyers' advisory committee of the Business Roundtable. This was formed in October 1981, and it is made up of about 30 attorneys from major companies that literally manage thousands and thousands of product liability cases.

We have been working on this legislation with your committee since that time, and have generally been in favor of the previous bill and this bill. As a matter of fact, we have met once a month, and if anyone had told me that 30 lawyers could agree on anything at the beginning, I would have said it was not possible, but they have, and they are clearly supportive of S. 44.

Since you already have my statement in the record, I think I will depart from it and just make a few comments in order to speed this up a little bit.

First, let me compliment this committee for having the courage to take on the design issue. As you can see, there is a little bit of trench warfare going on out here in the ABA in this attempt to have uniform legislation in this area, and I compliment the committee for taking it on and bringing it to a head in this committee.

There are several other important issues which have not been wholly resolved in S. 44, and they should be carefully considered. The bill should include provisions to deal with expert opinions that are unsubstantiated. However, I want to direct specific comments to four issues.

Government standards. First, the statute ought to deal with the importance of compliance with Government standards. All the working drafts which preceded S. 2361, now S. 44, included a section that placed weight on compliance or failure to comply with Government standards. We do not urge compliance as an absolute defense except in a few special situations where the manufacturer has no alternative but to comply with specific standards, for example, National Highway Traffic Administration and the Food and Drug Administration.

However, we believe that the Federal Government standards are enacted with the intention that a manufacturer use them as a guideline for product design. Perhaps the manufacturer will often exceed those standards, but unless we believe that those standards can be totally disregarded, the statute should provide that compliance will be given some weight.

Second, the product that was built according to Government design specifications should not be found to be unreasonable. The issue is dealt with in each draft prior to S. 2361. It is unreasonable to impose liability on a manufacturer producing a product in accordance with the specific contract requirements of the Federal Government. Realistically, we know that the Federal Government can and should exercise control over the many specialized products to insure that the item meets its needs functionally and economically.

Third, the bill should include limitations on the amount of punitive damages that may be awarded in a single action and an amount that may be awarded in multiple actions. Although S. 44 requires the board to consider the total effect of other things imposed upon the manufacturer, there is no limit.

Finally, I would suggest that we consider revisiting the question of contingent fees. A contingent fee is a unique characteristic of our court system. As has been testified to here before, a lot of the dollars that we expend as the stakeholders go to counsel and not to the particular plaintiff.

As we suggest, there was consideration previously by Congressman Bliley to put a limit on the recovery of contingent fees, and we would suggest to the committee that they at least revisit the subject which is a very important one.

In closing, the Roundtable urges all interested parties, industry, labor, consumers, the legal profession, and the administration, to work together to enact the product liability legislation. We pledge our full support for an effective reform measure based on S. 44. Thank you.

[The statement follows:]

STATEMENT OF PATRICK J. HEAD, CHAIRMAN OF THE LAWYERS' ADVISORY COMMITTEE OF THE TASK FORCE ON THE PRODUCT LIABILITY OF THE BUSINESS ROUNDTABLE

I am Patrick J. Head, vice president and general counsel of FMC Corporation. I represent the Business Roundtable and its task force on product liability as chairman of its Lawyers Advisory Committee.

In my statement I will briefly discuss the need for Federal product liability legislation and specific concerns of the Business Roundtable about S. 44.

Previous witnesses have explained in detail the confusing array of product liability standards in the 50 States. By itself, this is sufficient to justify Federal legislation to establish uniform standards for products distributed throughout the country.

BACKGROUND

It will be helpful to look at the policy behind product liability. In negligence actions before 1960, liability was based upon an examination of the manufacturer's conduct. More specifically, it focused upon the manufacturer's process of design and manufacture. If the conduct of the manufacturer's operation, i.e., the developmental process of design and manufacture comported with the actions that would be taken by a reasonable manufacturer, liability would not be imposed for an injury caused by a product.

This standard of negligence for manufacturers recognized that even the most prudent manufacturer could not prevent the shipment of some products that were below standard. A bolt might not be torqued correctly, a cap might not be tightly sealed or a bottle might be overpressurized. Such deficiencies could occur in spite of the most conscientious efforts of the manufacturer because individual people are responsible for the actual production, assembly and inspection of the product, and no one could guarantee that people would not make occasional mistakes. Nonetheless, a totally innocent person properly using the product for its intended purpose might be injured as a result of the deficiency.

STRICT LIABILITY AND DESIGN STANDARDS

Many courts concluded as a matter of policy that if the product did not meet the manufacturer's standards an injured person should be compensated. To accomplish this result some courts concluded, as a matter of law, that distribution of a product that did not meet the manufacturer's standards constituted negligence. The focus was clearly shifted from the actions of the manufacturer to the product itself. Soon, many courts following the lead of Justice Traynor in *Greenman v. Yuba Products*, 59 Cal.2d 57, 377 p.2d 897 (1963), concluded that it was more direct to characterize the product as defective and to impose strict liability without resort to the fictional characterization of the manufacturer's conduct as negligent.

This approach is direct and fair when applied to products that do not meet a manufacturer's own standards. However, the application of this standard to a manufacturer's design choices has created confusion not only for manufacturers but also for courts and juries.

Less than two weeks ago John W. Wade, dean and distinguished professor of law, emeritus at Vanderbilt University School of Law, at a conference on product liability in Chicago, highlighted the problems of identifying design defects. First, he explained that the test of defectiveness is not objective. In an effort to find some standard for this determination courts have developed several different guidelines for use by the jury:

1. Is the product unreasonably dangerous?
2. Does the product meet consumer expectations?
3. Would a reasonable person market the product if the condition were known?

4. A combined test of consumer expectations and whether a reasonable person would have marketed the product.

5. A balancing test of the risk of injury against the utility of the product [this is not intended to be an economic test although many have tried to treat it as such].

Unfortunately, none of these tests have added clarity. In fact, the attempt only confirms the confusion of courts as to whether the purpose of strict liability is (a) solely to provide compensation for injury thus limiting the judicial function to identification of a source of funds or (b) to determine responsibility for the events that were the proximate cause of the injury.

BASIC ISSUE

We are now at a crossroads of this fundamental policy choice. As originally applied to products with manufacturing defects (those that are truly defective) strict liability is a useful theory that can be understood and applied by juries. However, the attempt to apply this theory to product design is in reality an abdication by the courts of their responsibility for policy. Without a meaningful standard for "defectiveness", juries can only decide subjectively whether a defendant manufacturer should compensate the person injured.

The most vigorous arguments for the expansion of strict liability have been made by those lawyers who customarily represent persons who are injured. Under the claim of interest about compensation for persons injured by "defective" products, there is created a lottery in which the dominant issue argued in court is the nature and extent of a party's injuries after a cursory reference to a hastily fabricated design change in a machinery product or to a remote statistical chance that a chemical product could cause a disease.

Absent clear legal standards for liability, any injured person has some chance for a favorable verdict.—Plaintiff attorneys can expect to get any claim to a jury for decision with the slimmest thread of merit. The result is a game of Russian roulette that prompts the trial bar to file doubtful or marginal claims with the hope of substantial settlements.

If we intend to maintain a policy of imposing liability for injury upon those whose actions, or failure to act, has been a cause of that injury, then the standard must focus on the reasonableness of the manufacturer's conduct when adopting a product design.

Fortunately S. 44, in our judgment, deals effectively with this problem. While maintaining strict liability for manufacturing defects in section 5, it establishes a meaningful fault standard for deficient design. Enactment of this bill is essential and urgently needed. Failure to act now will only further the confusion created by decisions such as that of the Pennsylvania Supreme Court, *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), which concluded that a manufacturer is a "guarantor" of the safety of its products but not an "insurer". If there is a genuine difference in the effect of those two words in the product liability context, I have yet to find it. Such decisions will lead to absolute liability without compensation standards and without the benefit of eliminating the need for court proceedings and the associated high legal costs.

IMPORTANT ISSUES

Several important issues have not been wholly resolved in S. 44, and they should be carefully considered. The bill should include provisions to deal with expert opinions that are unsubstantiated and to establish a period of repose for all products. However, I want to direct these comments to the following issues.

GOVERNMENT STANDARDS

First, the statute ought to deal with the important of compliance with Federal Government standards. All of the working drafts that preceeded S. 2631 (now S. 44) included a section that placed weight on compliance, or failure to comply with a Federal Government standard.

We do not urge compliance as an absolute defense, except in a few special situations in which the manufacturer has no alternative but to comply with a specific standard (e.g., a National Highway Traffic Administration and the Food and Drug Administration). However, we believe that Federal Government standards are enacted with the intention that a manufacturer use them as a guideline for product design. Perhaps the manufacturer will often exceed those standards. But unless we believe that those standards can, and should be, totally disregarded, the statute should provide that compliance will be given some weight.

Certainly, failure to comply is and will be urged as a basis for liability. However, many design decisions are a trade-off between different kinds of risks, and a design that fails to comply with a standard in one respect may be safer over-all.

The section that we have proposed, based upon earlier drafts, provides simply that an aspect of a product in compliance with a Federal Government standard is not unreasonably dangerous in design; however, the claimant may establish by clear and convincing evidence that it was unreasonably dangerous and that a safer design was available. This is a reasonable, appropriate and necessary way to deal with the significance of Federal Government standards as they relate to product design.

The committee report on S.2631 concluded that this issue "merits further analysis," and I urge the committee to include it.

GOVERNMENT CONTRACTORS

Second, a product that was built according to Government design specifications should not be found to be unreasonably dangerous. The issue was dealt with in each of the drafts prior to S. 2631. Briefly, it is unreasonable to impose liability on a manufacturer for producing a product in accordance with the specific contract requirements of the Federal Government. Realistically, we know that the Federal Government can and should exercise control over the many specialized products that it buys to insure that the final item will meet its needs functionally and economically.

Of course, products that are commercially available would not be covered by this section. Including the provision allows manufacturers of specialized products for the Government to produce them as requested without the need for reexamination of the design or an attempt to include features that the Federal Government has determined are unnecessary.

One aspect of the problem has been highlighted by the recent decision of *Lockhead Aircraft Corp. v. United States*, 51 U.S.L.W. 4206, February 22, 1983, in which the Supreme Court determined that Lockheed could seek indemnification for its liability to a civilian employee killed in a plane crash. Previously, as a result of the frequently discussed decision in *Stencil Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), it appeared that a Government contractor might not be able to obtain indemnity for products liability. The decision in *Lockheed* illustrates the complexity and importance of this issue. Rather than deal with this issue by way of indemnity, the direct and perhaps better approach is to provide that the manufacturer is not liable when it follows the Government design requirements.

LIMITATION ON PUNITIVE DAMAGES

Third, the bill should include limitations of the amount of punitive damages that may be awarded in a single action and the amount that may be awarded in multiple actions. Although S. 44 requires the court to consider the total effect of other punishment imposed upon the manufacturer, there is no limit.

Previously, we have urged that a reasonable limit for a single injury would be two times the actual damages sustained with a limit of one million dollars. In the case of multiple accidents, there should be a further limit, and we recommend that this be the lesser of five million dollars or five percent of the manufacturer's net worth.

When this aggregate amount has been reached the claimant would still be allowed to recover the lesser of (a) litigation expenses or (b) the lesser of two times actual damages with a maximum of one million dollars.

These guidelines are recommended, not only by the Business Roundtable, but also by Professor David G. Owen of the University of South Carolina. In a recent article "problems in assessing punitive damages against manufacturers of defective products", 49 U. Chi. L. Rev. 1 (1982), he writes "the experience of the past several years has raised questions whether the punitive damages doctrine is being used in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large."

LIMITATION ON CONTINGENT FEES

The contingent fee is a unique characteristic of our court system. As plaintiffs' attorneys have worked to reduce the burden of proving liability, their fees have increased from 25 to 30, 40 and as much as 50 percent of the total compensation recovered. It does not require an elaborate study to recognize the plain economic interest of this portion of the trial bar. In fact, it was chiefly through their efforts in February that the House of Delegates of the American Bar Association voted to continue opposition to any Federal legislation on this subject. No positive recommendations

were made with regard to product liability policy, only opposition to uniform Federal liability standards. Yet, in spite of the official position of the House of Delegates, a poll of the American Bar Association six months ago revealed that enactment of Federal product liability legislation was of moderate or great importance to 73 percent of the membership.

Although it has not been discussed at length, a proposal initiated by Congressman Bliley (R-Va., 3rd) to limit the recovery of contingent fees could be an effective means to deal with the unreasonably high legal costs associated with these types of actions. His proposal would establish a graduated scale for contingent fees to limit the percentage to no more than 10 percent for awards over \$1,000,000 and up to a maximum of 40 percent for smaller awards. It merits careful study.

In closing, the Business Roundtable urges all interested parties—industry, labor, consumers, the legal profession and the administration—to work together to enact product liability legislation. We pledge our full support for an effective reform measure on S. 44.

[The following information was subsequently received for the record:].

QUESTION OF SENATOR KASTEN AND THE ANSWER THERETO

Question. When we examined this issue last year, we were concerned about the situation in which a contractor was an active participant, either directly or indirectly, in drafting government contract specifications. How can we draft a government specifications defense which acknowledges that there should *not* be a shield to liability in such cases?

Answer. The purpose of the government contractor defense is to allow the government to purchase products for defense and other special uses that will meet its performance requirements. Several courts have recognized the necessity for such a rule. In the absence of this rule, manufacturers will either refuse to sell products needed by the United States or they will be compelled to alter the product design in ways that may reduce the product's utility. The legal guidelines established by these courts provide the basis for legislative language that will exempt a manufacturer from liability only when the government has assumed responsibility for the design. The following language expresses this principle:

"In order that the U.S. government might be permitted to conduct its aerospace and defense programs in whatever manner it deems advisable, the manufacturer of a product purchased by the U.S. government for an aerospace or defense application shall not be liable for harm caused by the product on the ground that it was unreasonably dangerous either in design or formulation or because the manufacturer failed to provide adequate warnings or instructions if (1) the government established the relevant specifications of the product, including requirements for warnings or instructions, (2) the product met the government's specifications in all material respects and (3) the manufacturer did not conceal or fail to disclose to the government material information, of which the government was unaware, about the aspect of the product which caused the harm."

See *In re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1056-58 (1982).

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. Under S. 44, plaintiffs would have to prove by "clear and convincing" evidence their entitlement to punitive damages, and the amount of such damages would be fixed by the court. Do you think these changes from present practice are desirable? Why or why not? Why should punitive damages not be determined by the jury?

Answer. Many have called for the abolition of punitive damages in product liability cases, because they serve no tort law purpose. They are not directed at compensating a person for losses caused by the fault of another. Today, four states do not permit punitive damages in product liability actions.

Because punitive damages are generally recognized, it has been persuasively argued that the defendant should have the same constitutional protections that he would have under criminal law. One of those protections in criminal law is the right to have a case proven "beyond a reasonable doubt."

S. 44 does not go that far. Although punitive damages are non-compensatory, S. 44 assumes that the punishment involved is more in the nature of a civil fine than a criminal sanction. The damages are, in effect, quasi-criminal. Therefore, S. 44 follows the Uniform Product Liability Act and selects a standard of proof between the civil standard of "preponderance of the evidence" and the "beyond a reasonable

“clear and convincing” standard in criminal cases. The bill proposed a “clear and convincing” standard. A jury should be fully and completely convinced of the defendant’s reckless misbehavior before it subjects a defendant to punitive damages. The clear and convincing standard will focus the jury on this point and will do so better than the simple preponderance standard.

A jury should be fully and completely convinced of the defendant’s reckless misbehavior before it subjects a defendant to punitive damages. The clear and convincing standard will focus the jury on this point and will do so better than the simple preponderance standard.

With regard to the amount of punitive damages, S. 44 draws upon a concept that appears in a Connecticut statute. The court, rather than the jury, determines the amount of punitive damages. This approach is in accord with the longstanding tradition of the criminal law under which the jury determines the guilt or innocence of the accused and the judge imposes the penalty or sentence. This approach represents sound public policy.

Manufacturers may make and sell hundreds or thousands of a single product line. Thus, they are potentially subject to repeated imposition of punitive damages for harm caused by that product line. The net result may be over-punishment. A manufacturer in the multiple exposure cases can be subject to damages far beyond their guilt.

Further, where the amount of punitive damages is left to the jury, rather than the court, a manufacturer’s assets can be exhausted by the punitive damage awards before people seriously injured are able to recover compensatory damages from the manufacturer. A court can carefully examine this factor in determining how much in punitive damages should be awarded.

Question. If a jury finding on a question of fact constitutes a finding which is generic to the same question in different cases resulting from different events, does Section 4 lead to potentially unequal treatment of different plaintiffs in the same position, and to judicial inefficiencies? For example, if a jury finds that the drug DES can cause a rare form of cancer in the daughters of women who took the drug during pregnancy, why should subsequent juries have to ignore this finding?

Answer. S. 44 bars the use of a finding in one case as conclusive in the second case. This is sound public policy and will not result in judicial inefficiencies. The reasons for this are numerous.

First, the initial finding or verdict may have been decided or based on sympathy for the claimant or on facts that are not present in the subsequent case. To allow the results in the first case, based on a sympathy verdict or on unique facts, to bind the second case, would “exalt technical nicety over substantial justice.”

Second, a sympathy verdict in one case is sometimes accepted by a manufacturer or product seller, because the costs of appealing that verdict are greater than the cost of the adverse judgment. In such cases, it is unfair to allow the finding in the first case to bind subsequent cases.

Contrary judgments by juries may occur because they did not like the defense attorney, because evidence was admitted that should have been admitted, or because of other events that can occur in the course of a trial of a product liability case, any of which may affect the verdict on grounds other than pure merits.

Third, the prior adverse judgment may be the *only* adverse judgment on the issue. It is unfair to permit one loss to bind all other cases.

Fourth, the jury’s findings of a particular cause and effect relationship may have been correct in the individual case, but not for all future cases. Especially with cases that involve chemicals or pharmaceuticals, the unique interplay of person, environment, and other circumstances must all be considered. There may be a theoretical identity of issues among some cases, but there is not, as a practical matter, an identity of issues.

For these reasons, among others, most courts in most product liability cases have rejected the application of collateral estoppel. Nevertheless, it has created extensive and costly litigation. Manufacturers have to show again and again that the issues are not identical.

The application of collateral estoppel can lead to judicial inefficiencies. First, if it is allowed, a manufacturer may be “under the gun” to appeal every case in order to reverse erroneous, adverse verdicts, even though legal costs of doing so would be extraordinarily excessive. This creates a costly administrative burden on the judicial system.

It should be noted that S. 44 does allow collateral estoppel in the one situation where it can work fairly. Where two claims are based on harms caused by precisely same event in which two or more persons were harmed and the claimant is the same or is in privity with the claimant in the other action.

In sum, Section 4 does not result in unequal treatment of different plaintiffs, and it does not and will not lead to judicial inefficiencies. It promotes sound public policy and one that only can be achieved at the Federal level.

Question. S. 44 provides that a product is not unreasonably dangerous in design if its dangerous aspect could not "have been eliminated without seriously impairing the . . . desirability, economic or otherwise, of the product to the person who uses or consumes it?" Would this provision permit dangerous products to be sold where a safer design had been available but where implementation of such a design would have raised the price of the product substantially (but not enough to price it out of the market)? If it would, is this desirable? Why or why not?

Answer. Under S. 44, the trier-of-fact must determine whether the economic desirability of a product is seriously impaired by the cost of eliminating a dangerous aspect. The question, which indicates that the price of the product would be raised substantially (but not enough to price it out of the market), suggests that the economic desirability of the product would not have been seriously impaired by the elimination of the design defect. Thus, if the trier-of-fact resolves the issues in the manner posited by the question, the product would be found to be unreasonably dangerous.

As a precondition to a manufacturer's liability for failing to eliminate a dangerous aspect of a product, the trier-of-fact must conclude that the costs of eliminating the dangerous aspect would not seriously impair the economic desirability of a product. Virtually all products can be made safer at an increased cost. But at some point, the costs of providing additional safety features will make the product unattractive to its purchasers. Thus, the inquiry as to whether that point was reached—i.e., whether the cost of eliminating the dangerous aspect would impair the economic desirability—is appropriately a factual question that must be resolved against the manufacturer as a precondition to its liability.

Question. S. 44 adopts a negligence standard in failure to warn cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Which standard do you think should apply in such cases? Why?

Answer. Strict liability and negligence can easily be differentiated in cases of failure to warn or instruct.

Where strict liability is applied to such cases, the trier-of-fact considers only the adequacy of the warnings and instructions accompanying it—the manufacturer's conduct in promulgating these warnings or instructions would be irrelevant. Where a negligence standard applies, the trier-of-fact considers both the adequacy of the warnings and instructions and the manufacturer's conduct.

For example, consider a situation where a manufacturer failed to provide warnings about a danger that was scientifically unknowable when it made the product. Under a negligence standard, if the manufacturer's product testing was found reasonable, the manufacturer would have no liability. But if strict liability were applied, the focus is only on the warnings or instructions. Under strict liability, the product may be considered defective with the benefit of all scientific learning that occurred since the time of manufacture—and the manufacturer's product testing prior to manufacture is ignored.

Unless a manufacturer is to be held absolutely liable as an insurer for injuries caused by its product, its conduct in promulgating specific warnings and instructions must be taken into account. By providing a negligence standard, S. 44 provides a means for appropriately determining a manufacturer's liability in such cases.

Question. S. 44 absolves from liability nonmanufacturers who are not negligent or in breach of an express warranty, except in cases in which the manufacturer is not subject to service of process under the laws of the state in which the action is brought or the court determines that the claimant would be unable to enforce a judgment against the manufacturer. Do you think this is desirable? Why or why not? Do you think nonmanufacturers should be liable if the court determines that the claimant would be able to enforce a judgment against the manufacturer, but it turns out that, after a reasonable period of time, he cannot? Why or why not?

Answer. S. 44 adheres to the principle that nonmanufacturer product sellers should be liable only for harms caused by their own fault, unless the responsible product manufacturer is out-of-business or cannot be reached by judicial process. This principle stems from the strong recommendation of the Department of Commerce Task Force on Product Liability that such an approach will help reduce "the problem of excessive product liability costs for parties other than the manufacturers in the distribution chain. . . ."

Good data shows that nonmanufacturer product sellers account for only 4.6 percent of the total amount of product liability payments. Case law generally allows nonmanufacturer product sellers to shift the costs of a product liability judgment

onto the product manufacturer who actually caused the harm through an indemnity or contribution suit.

In spite of their very small role in product liability cases, wholesalers, retailers, and distributors are frequently brought into product liability suits. As a result they have substantial costs relating to insurance premiums and defense costs. These costs are added to the price of products and are a waste of legal resources.

If S. 44 strictly adhered to the tenet that responsibility for harm should be placed on the party that actually caused the harm, it would only hold product retailers, wholesalers, and distributors liable when they themselves are at fault. This is the law in some states. S. 44, however, rejects this rule. In an attempt to meet consumer concerns, S. 44 imposes vicarious liability on product sellers when the truly responsible manufacturer is out-of-business or not reachable by service of process. If a court determines that a claimant would be able to enforce a judgment against the manufacturer, but it turns out that he cannot, the plaintiff can make a showing that is required in Section 8 of S. 44.

Question. Do you think a period of limitations from the date of first sale is desirable? Why or why not? Assuming you think such a period of limitations is desirable, do you support the 25 year period in S. 44, applicable only to capital goods only in design defect and failure to warn cases? Would you shorten it, lengthen it, or extend it to manufacturing defect or breach of express warranty cases? Why or why not?

Answer. The statute of repose in S. 44 begins the relevant 25 year period at "the date of delivery of the product to the first purchaser . . ." As compared with other dates, i.e., date of manufacture, production, or design, the date of delivery is the time closest to when the product is actually obtained by the purchaser. Further, it is a relatively identifiable period.

With regard to the duration, the 25-year time was chosen with a view to provide the utmost protection to persons who use products. According to Insurance Services Office, almost all product liability cases will occur within that period of time.

The rationale for the statute is threefold. First, a product, used safely for over 25 years, in all likelihood, was not defective at the time of delivery. Second, after 25 years the facts about the product and its design and manufacture are extremely difficult to develop, because the passage of time creates obstacles to securing proof.

Third, as a matter of sound public policy, persons at some point in time ought to be able to plan their affairs with reasonable certainty.

The relatively few cases that may be brought for products over 25 years old are usually nuisance cases. These cases are sometimes settled even though there is no factual basis for liability.

The statute does need to be extended to manufacturing defect cases. Manufacturing defects almost always manifest themselves relatively soon. Similarly, the statute should not extend to express warranty cases. Where an express warranty guarantees the safety of the product for a specified or unlimited period of time over 25 years, that warranty should apply.

Question. If S. 44 is enacted, do you think many injured parties who could otherwise prove their case would be barred by the 25 year limitations? Do you think S. 44, as written, would leave the states free to enforce a period of limitations beginning on the date of first sale in manufacturing defect or breach of express warranty cases? Should S. 44 allow states to do this? Why or why not?

Answer. The twenty-five year statute of repose provided by S. 44 will affect few, if any, injured parties. The 1977 study by the Insurance Services Office (ISO), which considered approximately 24,000 product liability claims that were settled or finally adjudicated, indicates that less than 1/10 of one percent of all persons injured by a product sustain their injuries more than 15 years after the date the product was first purchased. While the ISO study did not differentiate among claims that occurred more than 15 years after the date the product was first purchased, intuitively one would suspect that the number of those claims occurring more than 25 years after the first purchase are substantially less than 1/10 of one percent.

Moreover, because S. 44's statute of repose is applicable only to capital goods and contains further exceptions for delayed manifestation of harm, latent defects, and fraud and misrepresentation, if any, injured persons would be foreclosed from suit by this provision.

Also, S. 44, as written would not permit a state to enforce a period of limitations with respect to a capital good in the case of an alleged manufacturing defect or breach of express warranty. Preemption of state law provided by S. 44 would be effective to preclude the enforcement of such limitation.

Question. Have product liability insurance costs increased or decreased, during the last five years? Could you please provide any studies, statistics, or other infor-

mation upon which you base your conclusions? If product liability insurance costs have decreased, what nexus is there between costs and the need for S. 44?

Answer. The Insurance Services Office has indicated that actuarially computed product liability rates, called manual rates, for some product lines have stabilized or declined slightly during the years 1978, 1979, and 1980. Manual rates, predetermined on the basis of prior loss and expense experience, are used primarily for smaller risks that account for only about 10 to 20 percent of total product liability insurance volume. Most product liability risks are written on what is called an "a" rate basis, meaning they are rated primarily on the underwriter's judgment of the risk involved. Such rates are not a matter of record, but are determined on a risk-by-risk basis, and have varied widely in recent years.

There has been substantial competition among insurers in recent years spurred by the enactment in 1981 of the risk Retention Act. The Act gives insurers an alternative to commercial product liability insurance. The financial media indicate that product liability insurance has frequently been sold at a substantial underwriting loss. The same media indicate that insurers have survived in this area because of the boost that double digit inflation has provided to investment returns on loss reserves. A substantial amount of product liability premium is placed in reserves, both for pending claims and for claims incurred but not reported.

Now that inflation appears to be under control, this factor that has helped stabilize rates may disappear. Many knowledgeable people in the insurance industry have predicted a product liability rate crunch. The reality of the overwhelming legal costs and other costs associated with product liability will have to be faced directly by insurers.

Another factor to consider is that comparing product liability premiums for the same company from year to year may be deceptive. Indeed, a number of companies are paying premiums similar to premiums paid in the past, but they are getting less coverage. Many companies have avoided paying higher premiums for product liability insurance only by paying higher deductibles.

Question. In light of the fact that the bill would require the state courts to interpret terms and apply legal standards with which they may be unfamiliar, and in light of the fact that many states appear to have well-settled liability rules which the bill may very well disrupt, how do you believe that the bill in fact will achieve its stated goal of uniformity? What effect will the initial, and perhaps lengthy period, of new interpretation and confusion following the creation of federal standards have on transaction costs? Please provide any studies or statistics which show how much in transportation costs would be saved if uniform standards were imposed?

Answer. Current product liability law continues to be in a state of flux. The adoption of S. 44 would substantially reduce the uncertainty characteristic of present law. Initially, there is likely to be a period during which courts grapple with problems in its interpretation. This is not unusual, but is attendant to the enactment of any uniform law.

Transaction costs under the current system are significant: Lawyers—both plaintiff lawyers and defense lawyers—now receive fifty-four cents out of every dollar paid on account of product liability claims (i.e., seven dollars to lawyers for every six dollars to injured plaintiffs.)

It is not surprising that legal fees are so high. Plaintiff attorneys are forever seeking the adoption of new and novel product liability theories. However, arguing, briefing, and appealing the applicability of these novel theories involves substantial costs—which is why legal fees exceed the payments received by injured parties.

With a federal product liability law, the legal theories potentially applicable to any product liability litigation would be limited to those provided by the statute. Thus, once the product liability statute has had time to be interpreted, transaction costs would fall off substantially.

Question. Can you point to any specific instances where product liability insurance costs, product liability judgments, or any aspects of the tort litigation system have caused a business to discontinue a product line? If so, could you provide as much information as possible about the decision to discontinue including the name of the firm, the type of product discontinued, the year the product line was discontinued, the specific reasons the firm stated at the time as the basis for the decision to discontinue, the number of injuries caused by the product line, the number of claims made as a result of such injuries, the number of product liability lawsuits brought against the firm because of such liabilities, the number and size of settlements in these lawsuits, and the number and size of judgments in favor of the plaintiff in such lawsuits? Can you provide any studies or statistics which support the contention that product liability insurance costs, product liability judgments, or un-

certainties in the tort litigation system have caused businesses to discontinue a product line?

Answer. The answers to the question are treated by manufacturers as privileged information. But statements by many businesses before the Senate Commerce Committee suggest that the problem is real. If businesses were to provide in detail the information requested in the question, they could subject themselves to potential product liability suits and inquiries in product liability cases about the details of the decisions to discontinue a product line.

On occasion, businesses have indicated that they have discontinued lines. For example, Secretary of Commerce, Malcolm Baldrige, has publicly stated that Scovill Corporation discontinued certain product lines because of potential product liability exposure. (The Honorable Malcolm Baldrige, Luncheon Remarks, National Legal Center for the Public Interest, May 27, 1981.)

Question. Can you provide any statistics or studies which support the contention that product liability problems have led businesses to decide not to introduce a new product line? Are there any specific instances of businesses which decided not to introduce a new product because of liability problems? Could you provide information about such examples including the name of the firm, the type of product which was not introduced, the year the decision against development or marketing was made, and the exact nature of the product liability problems which led to the decision?

Answer. This information is generally privileged. The Federal Interagency Task Force on Product Liability indicated, based on privileged information that could not be released, that some businesses have declined to introduce a new product line because of product liability exposure. (Final Report of the Task Force on Product Liability at VI-28 to VI-32, May 1977). Again, numerous businesses have indicated in hearings that due to product liability exposure they have decided not to introduce new product lines. If they provided the details suggested in the question, they probably would never introduce such lines because of product liability exposure problems. Their statements would be interpreted as "admissions" and utilized against them in potential product liability cases.

Question. S. 44 says a product is unreasonably dangerous in design or formulation if a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation that the manufacturer used. Isn't innovation necessary for American industry to lead the world in the design of new products? Do you think that S. 44 might discourage the designing of new products since other manufacturers in the same circumstances might not have taken the same risk. Also, do you believe that the company which designs a new product, which its competitors chose not to design, will face an increase in product liability suits because of S. 44?

Answer. S. 44 balances the need for innovation against the need to protect persons from harms caused by products. It focuses, as the question suggests, on whether "a reasonably prudent manufacturer in the same or similar circumstances would have used the design or formulation that the manufacturer used . . ." S. 44 will encourage new product designs; such efforts would be discouraged only where a reasonable manufacturer would not have engaged in such activity. This is precisely the behavior sound public policy should impose on manufacturers.

A company that designs a new product that its competitors chose not to design will not face an increase in product liability suits because of S. 44. To the contrary, Section 14 of the statute prohibits evidence of new product improvements from being introduced against the same manufacturer in cases involving older products. Thus, S. 44 will help encourage, or at least not discourage, new safety innovations. Presently, under the law of a few states, the very unfair and unsound result suggested in the question occurs. Under the law in these few states, a person who puts a new safety device on his product is in a worse product liability situation than one who does not make the improvement. Why? Because the person who does not use the new safety device will not be penalized in court by the introduction of evidence of such device in cases involving his older products. Under S. 44, this unfair result is eliminated.

Question. Could you provide any statistics, studies, or references to studies which indicate whether the Risk Retention Act of 1981 has led to a decrease in product liability insurance costs?

Answer. There has been virtually no experience to date under the Risk Retention Act of 1981. *Business Insurance* magazine, which attempted several months ago to determine the number of risk retention groups that have been formed under that Act, was able to identify only one. And in that case, state regulators were taking the position that if was not a valid group. Thus, it is doubtful that the Risk Retention Act of 1981 has had any impact on insurance rates.

Nevertheless, Insurance Services Office (which sets nationally applicable product liability insurance rates for most of the property-casualty insurance industry) indicates that actuarially computed product liability rates have declined slightly since the late 1970's. Actuarial rates, however, account for only about ten percent of the total product liability insurance premium volume. The remaining ninety percent is derived from judgment rates—rates based upon the exercise of underwriting judgment. While these judgment rates have been "soft" in recent years, it is not because of the Risk Retention Act.

The financial media has amply recounted how, since 1981, the property and casualty insurance industry has been writing commercial insurance, including product liability coverage, at substantial underwriting losses. These losses however, have been recouped by the insurers via double-digit interest rates available on investments. Thus, high interest rates have played a substantial factor in the pricing of product liability insurance.

But high interest rates are not the only factor that would tend to reduce the price of product liability insurance coverage. Insurers are also providing increasingly less insurance protection for the same product liability premium dollar. This comes about in a variety of ways.

First, product liability insurance is frequently being written with substantial deductibles or retentions, in contrast to former practice. For example, Mr. Ivan Brand who testified before the Subcommittee on April 6, 1983, indicated that his company, Vermeer Manufacturing Company, maintained first dollar coverage until 1979, at which time it was required to assume a deductible of one million dollars. Thus, a comparison of product liability premiums over time is meaningless unless the payments made on account of deductibles and retentions are also taken into account.

Additionally, the scope of coverage has been decreasing. For example, the product liability policies of many companies now require them to pay all attorneys fees, in marked contrast to their coverage several years ago wherein the insurers paid these fees.

These reductions in coverage are in addition to specific exclusions routinely made for certain environmental injuries and for injuries resulting from nuclear products. And of course, punitive damages are also denied coverage in most jurisdictions.

Thus, independent of the adoption of the Risk Retention Act, whatever price reduction that has come about is attributable to the availability of increased investment returns and reductions in the extent of product liability coverage.

Question. S. 44 adopts a negligence standard in design defect cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. Strict liability and negligence can easily be differentiated in design defect cases.

Where strict liability is applied to such cases, the trier-of-fact considers only the product—the manufacturer's conduct would be irrelevant. Thus, despite a manufacturer's exercising all reasonable care in the design of the product, it would be liable for injuries resulting from a product that was determined to be defective.

A negligence standard, however, would require the trier-of-fact to consider both the product and the manufacturer's conduct. Under a negligence theory, the trier-of-fact would be required to find not only that the product was defective, but also that the manufacturer was negligent.

We believe that S. 44 properly applies a negligence standard to cases involving a design defect.

In such cases, the manufacturer has made a conscious decision to utilize a particular design. And in so doing, a manufacturer has implicitly or explicitly rejected alternative designs. While some of these might, in fact, have prevented a plaintiff's harm, they may well have increased the likelihood or seriousness of another kind of injury. Moreover, in choosing a particular design, the manufacturer considered non-safety factors as well. One commentator has illustrated these as follows:

"He must consider cost: some designs, however safe, are simply too expensive to be marketable—e.g., a crash-proof car that costs \$1 million a unit to build. He must consider efficiency: a crash-proof car with a maximum speed of three miles per hour is of little use."

Unless a manufacturer is to be held absolutely liable as an insurer for injuries caused by its product, some balancing of the competing concerns in its decision to utilize a particular design must be made. By providing a negligence standard, S. 44 provides a means for appropriately determining a manufacturer's liability in such cases.

Question. How does an increase in the standard of proof from strict liability to negligence create incentives for improved product safety?

Answer. First, under S. 44, strict liability is imposed for manufacturing defects and violation of an express warranty. This standard is a good deal clearer than the strict liability standard in many states which, unlike S. 44, also requires proof of "unreasonableness" with respect to mis-manufactured products. Under this standard, manufacturers will know that they must have perfect quality control or pay the cost of harms caused by manufacturing defects.

With respect to design defect cases, as has been indicated, the majority of states apply a negligence standard. It is true that in some of the states the standard is very unclear. The lack of clarity in the law and the diversity of rules that currently exist in the United States mute incentives for product safety, because manufacturers simply do not know what the standards for design liability are. Under a clear negligence standard, such as that in S. 44, manufacturers have a very strong incentive to accord their behavior with reasonable prudence. This is, in effect, an incentive for safety.

QUESTIONS OF SENATOR HEFLIN AND THE ANSWERS THERETO

Question. One of the reasons we are considering preempting state standards of liability is the claim on the part of many manufacturers that the state tort litigation system has produced unnecessarily high insurance costs. In July of 1981, *Business Insurance* magazine reported, and I quote, "Product liability insurance premiums have leveled off or plunged during the last three years." Do you agree that product liability insurance costs have decreased recently?

If yes, doesn't this eliminate one of, if not the, primary justification for the imposition of federal product liability standards?

If no, I would greatly appreciate receiving the most current evidence about product liability insurance costs. Could you provide a report on the issue?

Answer. First, I want to emphasize that we have never believed that product liability insurance rates are the primary reason for establishing federal product liability standards. The need for reform is amply justified by the substantial inequities in the current system caused by the lack of uniform standards.

Insurance rates are only a symptom of the basic problem. although premiums appear to have stabilized, the figures are misleading. Rate changes have been influenced by a number of factors. When insurance premiums rose significantly in the seventies, many businesses became self-insured or purchased insurance in London. Now the insurance industry in the United States has cut its premiums to regain this lost business. This is only a temporary adjustment and the premiums are expected to rise again quickly.

Second, the real cost of insurance has increased as insurance carriers have increased deductibles. The result is that the real cost of product liability falls directly on the insured, and insurance carriers are collecting premiums for a smaller portion of the risk. Thus, although insurance premiums may be stable, the actual cost of product liability continues to rise.

Question. In 1981, we passed the Risk Retention Act in order to decrease insurance costs. I recognize that there are many aspects of the product liability issue, but shouldn't we allow the Risk Retention Act to work before undertaking as drastic a measure as the preemption of state tort law? Do you have information about the effect the Risk Retention Act has had so far? Could you provide us with such information?

Answer. The Risk Retention Act was not expected or intended to deal with the fundamental product liability problem described above. The act allows some businesses to utilize alternative methods (through pooling arrangements) to obtain insurance. We never expected that the Risk Retention Act would lower product liability cost or all businesses would use the act to obtain insurance. Within the short time this act has been in effect, it has benefited only a few businesses, and we do not expect this will change.

Question. I am unaware of any act of Congress that establishes federal tort standards which are enforceable exclusively in the state courts. I know that the Federal Employees Liability Act preempts state tort law but that act creates concurrent federal and state jurisdiction. Also, until two years ago, there was no federal and state jurisdiction. Also, until two years ago, there was no federal question jurisdiction for cases involving less than \$10,000, but that jurisdictional statute did not involve the preemption of a specific area of law traditionally left to the states. Are you aware of any statutes which preempt state tort law but which refuse to allow the federally-created standards to be enforceable concurrently in federal courts?

Answer. The proposed Product Liability Act does not in any way alter or limit federal diversity jurisdiction. If for any reason it does, we would support a modification to clarify this point. The proposed legislation will establish uniform product liability standards that will be enforced in the state and federal courts in the same manner that product liability cases are now handled by both courts. The act will not have any effect on the ratio of cases litigated in the federal and state courts.

Senator KASTEN. Professor Joseph Page, the Georgetown University Law Center. Professor Page.

Mr. PAGE. Thank you, Senator.

My name is Joseph A. Page, at the Georgetown University Law Center, where I teach torts and product liability law, and where I have also taught legislation.

It is a pleasure to be back here discussing with you S. 44, the flagship of the new Federalism. I have already expressed in hearings last year some of the reservations I have about a Federal bill and this Federal bill in particular, and would like to this time around devote the few minutes which I have to some specific comments with respect to the bill.

First of all, it has been pointed out that the virtue of the common law is its adaptability and flexibility to new situations and changing times. Once you freeze something in statutory language, your rules become in effect carved in stone. You cannot change them without going back to the Legislature, in this case through the Congress, and it is not going to be an easy thing to get a bill like this amended when the need arises.

Let me give you one example of the kind of case which might come up. We cannot possibly at this time foresee every single kind of a situation that will arise in the future. Let me just give you one situation which I believe will present a serious problem under this statute. Let us assume that a manufacturer is manufacturing pacemakers, and the manufacturer produces a batch of pacemakers, one of which is implanted into the plaintiff's heart.

Subsequent to this implantation, it is discovered that there is a rate of 10 percent defects in the batch of pacemakers, one of which is implanted in the plaintiff. As a result, because of the seriousness of the defect, the plaintiff has to undergo surgery to have the pacemaker removed. There are some complications, and he suffers further harm as a result of the surgery.

It is later discovered that there is nothing wrong with that particular pacemaker that that plaintiff had, but he suffers harm.

Under this bill, because there is a definition of a product in section 210, the plaintiff could not recover. Under common law, at least it would be possible for a court to decide that for this particular kind of a product in this kind of limited circumstance, if there is something wrong with a certain percentage in a batch, the requirement of defectiveness ought to apply to the whole batch rather than the individual product, so that any plaintiff who has this implanted and has to have it removed would be able to recover for any resulting personal injury.

You could do that under common law. Under this statute, you could not, because of the way defect is defined.

Another problem also is that all the previous product liability bills that have been introduced on the Senate side, H.R. 2561, H.R. 5214 in 1981, and previous bills, contain statements of purpose.

This bill is noticeable because it does not say what purpose it is supposed to serve. The Senate report only speaks about correcting the uncertainties in State law. Well, any Federal statute, no matter how good or how bad, it would do away with the uncertainties.

It seems to me, as I think I indicated last year, that one of the things you have to address is the fact that as the Commerce Department report clearly pointed out, one of the causes of the product liability crisis is the fact that there are a lot of unsafe products out on the market that are injuring and killing people.

One purpose of this bill, if you are really serious about putting out a good, balanced, reasonable product liability bill, should be to encourage the production of safer products and eliminate those aspects of State law which unfairly burden product liability claimants.

Therefore, the bill should state as one of its purposes the need to create a standardized Federal product liability law that would give manufacturers an incentive to produce reasonably safe products and provide protection for consumers and other people; this would be an aid later on when courts have to construe the statute. They will be able to construe it with that particular goal in mind.

One or two other specific points in the bill. There is a provision in section 10(c)(2)(B) which creates as a defense assumption of the risk. That is, if the plaintiff knowingly and voluntarily encounters a known product risk, this may diminish the amount of the plaintiff's recovery under the comparative responsibility provision.

What this does is to make reasonable assumption of the risk a defense which would reduce the plaintiff's recovery. Why is that? Assume you have a negligent manufacturer who has designed an unreasonably dangerous aspect of the product that hurts the plaintiff. That plaintiff is found by a jury to have reasonably decided under particular circumstances of a case to encounter that risk. Why should that plaintiff's recovery be diminished in any way?

Many States, a number of States now have abolished reasonable assumption of the risk as a separate defense. This bill would be a step backwards for people in those jurisdictions.

Some of the points that were just made with respect to provisions that ought to be stuck back into the bill perhaps I could comment on very briefly.

Beware of putting limits on punitive damages. If you put a dollar limit in this Federal bill on punitive damages, you will be running into the possibility of constitutional challenges based upon the equal protection clause of the U.S. Constitution. That is, there does not seem to be any rational reason why manufacturers who are guilty of wanton misconduct should have a particular cap put in their punitive damages but not other people.

The Government standards provision, there is really no need to stick it in the bill because State courts now give some weight to Government standards, and there is no real problem to be addressed. I think it was a wise thing for the committee to leave that out.

I think I have probably exceeded my time, so thank you very much, Senator.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question 1. Have product liability insurance costs increased or decreased during the last five years? Could you please provide any studies, statistics or other information upon which you base your conclusion.

Answer. I have no information on the basis of which I could answer this question.

Question 2. In light of the fact that the bill would require the state courts to interpret terms and apply legal standards with which they might be unfamiliar, and in light of the fact that many states appear to have well-settled liability rules which the bill may very well disrupt, do you believe that the bill in fact will achieve its stated goal of uniformity? What effect will the initial, and perhaps lengthy period, of new interpretation and confusion following the creation of federal standards have on transaction costs?

Answer. S. 44 will produce uniformity where it creates clear, unambiguous rules and standards which will not require interpretation. The bill, however, contains a number of ambiguous terms: e.g., "proximate cause," Sec. 8 (a)(c); "personal physical illness," Sec. 2(5)(B); "product," Sec. 2(10); "available and capable of use," Sec. 2(8); "matters," Sec. 3(c); "eliminate," Sec. 5(b)(2); "shall consider," Sec. 13(b). These terms may have to be construed by the 72 different courts having penultimate jurisdiction in product liability suits (the 50 state supreme courts and the 12 U.S. Courts of Appeal in diversity cases), with the United States Supreme Court conceivably having the last word.

Question 3. S. 44 adopts a negligence standard in design defect cases. Do you think strict liability and negligence can be meaningful differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. It is possible to make a slight, meaningful distinction. As Professor Richard A. Epstein (generally pro-defendant on product liability issues) argues in his book *Modern Product Liability Law* (pp. 71-72), strict liability principles should govern in cases where a product as designed by the manufacturer "contains a trap, a hidden danger that is in no way apparent from its benign outward appearance." Although such designed-in, hidden traps will in fact almost always reflect manufacturer negligence, plaintiffs should not be saddled with the burden of establishing fault; and defendants should not be exonerated upon a showing that they conformed to the state of the art or with applicable statutory standards.

The choice of a standard in the context of federal products liability legislation is basically political. I would not be unhappy with a negligence standard if other aspects of the bill tilted more favorably toward plaintiffs. Moreover, the alternatives are not simply negligence vs. strict liability; indeed, S. 44 does not adopt a rule of negligence in design cases, but instead creates a negligence standard incumbered by additional burdens for plaintiffs. A balanced bill would eliminate these burdens and also seek to grapple with the difficulties plaintiffs might face in establishing design negligence.

Question 4. S. 44 provides that a product is not unreasonably dangerous in design if its dangerous aspect could not "have been eliminated without seriously impairing the . . . desirability, economic or otherwise, of the product to the person who uses or consumes it." Would this provision permit dangerous products to be sold where a safer design had been available but where implementation of such a design would have raised the price of the product substantially (but not enough to price it out of the market)? If it would, is this desirable? Why or why not?

Answer. The above-quoted clause comes from Section 5(c), which in its entirety is ambiguous, undesirable and unnecessary. It is not clear to what products this language is suppose to apply and how it differs from Section 5(b). It seems to mandate a lesser standard than reasonable care for some products. I agree with Professor Aaron Twerski's devastating critique of Section 5(c) in his article "National Products Liability Legislation: In Search for the Best of All Possible Worlds," 18 Idaho Law Review 411, 428-30 (1982), and with his conclusion that "This Section should be excised from the bill."

Question 5. S. 44 adopts a negligence standard in failure to warn cases. Do you think strict liability and negligence can be meaningfully differentiated in such cases? Why or why not? Which standard do you think should apply in such cases? Why?

Answer. Strict liability can be meaningfully differentiated from negligence if knowledge of risk is imputed to the manufacturer as of the time the product was

marketed. Thus, even if a risk had been unknowable at the time of marketing, a manufacturer might be strictly liable for failing to warn of that risk.

As I have indicated in my answer to Question 3, the choice of a standard is essentially political. In my view, a respectable case can be made for adopting a rule of strict liability for harm from unknowable risks caused by drugs, toxic chemicals and dusts and similar products, not because of any failure to warn but because they inflict upon consumers the same kind of harmful surprises as products with construction defects. It seems to me that the reasons justifying a rule of strict liability as formulated in Section 5(a) would equally apply to unknowable hazards.

Question 6. Do you think a period of limitations from the date of first sale is desirable? Why or why not? Assuming you think such a period of limitations is desirable, do you support the 25 year period in S. 44, applicable only to capital goods and only in design defect and failure to warn cases? Would you shorten it, lengthen it, or extend it to manufacturing defect or breach of express warranty cases? Why or why not?

Answer. The 25-year time limitation in Section 12 seems to me to be a reasonable political compromise as is.

Question 7. If S. 44 is enacted, do you think many injured parties who could otherwise prove their case would be barred by the 25 year limitation? Do you think S. 44 as written would leave the states free to enforce a period of limitations beginning on the date of first sale in manufacturing defect or breach of express warranty cases? Should S. 44 allow states to do this? Why or why not?

Answer. I would guess that very few injured parties would be barred by Section 12. Whether or not states could enact their own time limitations for manufacturing defect and express warranty cases would be a matter of statutory construction. It is possible that some courts would interpret Sections 3(c) and 12 as permitting this, while other courts might interpret these Sections as prohibiting it. The bill should be clarified on this point.

Question 8. Under S. 44, plaintiffs would have to prove by "clear and convincing evidence" their entitlement to punitive damages, and the amount of such damages would be fixed by the court. Do you think these changes from present practice are desirable? Why or why not? Why should punitive damages not be determined by the jury?

Answer. Section 13 is designed to cure alleged abuses in the awarding of punitive damages in products liability cases. In my view the Section tilts too far in favor of defendants. For example, the test for punitive damage entitlement is "reckless disregard for . . . safety." This is a clear and fair standard; I see no need to go further and require "clear and convincing evidence;" the traditional burden of proof in civil cases would appear to be sufficient.

Section 13 does not respond to the criticism that it is illogical to punish by giving money to an injured person who will also receive compensatory damages from the defendant. Under this view, punitive damage awards are seen as windfalls to plaintiffs and their attorneys. An imaginative way to deal with this problem would be to vest discretion in the trial judge to award a percentage of a punitive damage award to any non-profit organization whose purpose is to seek ways to prevent, cure or mitigate the type of harm suffered by the injured plaintiff in the case at bar.

Question 9. Do you think S. 44 should address the market share theory of liability adopted in *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980)? Why or why not? If so, what position should it take? Why?

Answer. If there is one area which cries out for national uniformity, it is the problem of the generic product which inflicts widespread harm under circumstances which make it impossible for a plaintiff to prove which of several manufacturers sold the particular product which caused his or her injury. The case law is currently in disarray, and federal intervention seems highly appropriate.

I would be disposed to adopt some variant of the *Sindell* marketshare approach, which would be much easier and fairer to apply on a national scale.

Question 10. In a number of states, involuntary assumption of the risk has been eliminated from the law as a defense. Why should assumption of the risk be included in S. 44 as a defense?

Answer. I assume you mean voluntary assumption of the risk, since there is no such legal animal as "involuntary assumption of risk." The appearance of the thoroughly discredited defense of assumption of the risk in a federal product liability statute furnishes "clear and convincing evidence" to those who claim that this is a defendants' bill.

Question 11. Explain what is meant by proximate cause in S. 44? Is the current committee report language sufficient to provide a federal rule or will the courts

resort to varying state rules for interpretation? What effect would proximate cause language in S. 44 have on plaintiffs in cases like the DES cases?

Answer. I haven't the faintest idea what the term means in the context of this bill. The Committee Report (p. 24) states that "Proximate cause is generally understood to mean that which is a significant cause of a harm for which the defendant should be held responsible." This is hardly a fair statement; and torts teacher will attest to the fact that proximate cause is not generally understood to mean anything. The courts will have wonderful time construing the phrase. Moreover, since "proximate cause" is one of the "matters" governed by the Act, state law on the issue will be superseded (Sec. 3(c)), so that the courts will have to fashion a new federal law of "proximate cause."

The Committee Report states that "Proximate cause presupposes 'cause in fact,' which is a purely factual inquiry" (p. 24, fn. 67). It is possible that courts will construe the "proximate cause" requirement as also mandating cause in fact in its traditional sense, a burden which the overwhelming majority of DES plaintiffs cannot meet.

Question 12. If a jury finding on a question of fact constitutes a finding which is generic to the same question in different cases resulting from different events, does Section 4 lead to potentially unequal treatment of different plaintiffs in the same position, and to judicial inefficiencies? For example, if a jury finds that the drug DES can cause a rare form of cancer in the daughters of women who took the drug during pregnancy, why should subsequent juries have to ignore this finding?

Answer. Section 4(c) prohibits the use of the doctrine of collateral estoppel both offensively and defensively to establish facts necessary to determinations described in Section 4(a). This prohibition cuts both ways; a jury finding that DES can cause a rare form of cancer would be treated the same way as a jury finding that DES cannot cause cancer. Though Section 4(c) might produce some efficiency, it will also do away with the possibility that critical factual determinations will ride upon how well a particular plaintiff's attorney performed in the first case to litigate the factual issue in question.

Question 13. Harm is defined in S. 44 to exclude recovery of damages for mental distress in the absence of physical harm. Shouldn't a claimant, institutionalized for life due to a mental illness resulting from an accident involving a faulty product, be allowed to recover damages?

Answer. Certainly. The definition of "harm" in Section 2(5) provides further ammunition for those who aver that the bill is unfair to plaintiffs.

Question 14. Will federal product liability legislation "straight jacket" the law?

Answer. It is my understanding that a principle goal of S. 44 (which, by the way, does not state its purposes) is to create precisely delineated rules for product liability litigation. To a certain degree this will surely "straight jacket" the law.

QUESTION OF SENATOR HEFLIN AND THE ANSWER THERETO

Question. I am unaware of any act of Congress that establishes federal tort standards which are enforceable exclusively in the state courts. I know that the Federal Employees Liability Act preempts state tort law but that act creates concurrent federal and state jurisdiction. Also, until two years ago, there was no federal question jurisdiction for cases involving less than \$10,000, but that jurisdictional statute did not involve the preemption of a specific area of law traditionally left to the states. Are you aware of any statutes which preempt state tort law but which refuse to allow the federally-created standards to be enforceable concurrently in federal courts?

Answer. No.

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, D.C., July 22, 1983.

HON. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science and Transportation, Washington, D.C.

DEAR SENATOR KASTEN: This is to submit for the record and for the Committee's consideration some comments on Section 10(c)(2) of S. 44.

In oral testimony to the Consumer Subcommittee on April 6 of this year, criticism was directed at Section 10(c)(2)(B) because it makes reasonable assumption of risk a defense to a product-liability claim under the Act. S. 44 limits liability in design and failure-to-warn cases by requiring what amounts to proof of fault by the manu-

facturer. Section 10(c)(2)(B) permits the defense of reasonable assumption of risk to reduce a plaintiff's recovery. Thus, in a case where a manufacturer has negligently designed a product or negligently failed to warn and plaintiff has reasonably assumed the risk, the manufacturer will not be required to compensate plaintiff, despite the latter's blamelessness, for all damages sustained.

The defense of reasonable assumption of risk has long been criticized and has been abolished in a number of states. Section 402A of the Restatement of Torts (Second Edition) specifies that only unreasonable assumption of risk will be a good defense to strict tort liability. In Part A to the Appendix to this letter we have made a partial list of jurisdictions which limit the defense to unreasonable assumption of risk in product-liability cases.

We urge the Committee to follow the enlightened rule and delete Section 10(c)(2)(B) from S. 44.

Section 10(c)(2)(A) provides that the principle of comparative responsibility will be applicable when a claimant is injured by a defective condition which would have been obvious, without inspection, to an ordinary prudent person. This reduces manufacturer incentives to design patent dangers out of their products. The so-called patent-danger rule, exonerating manufacturers from any responsibility to eliminate or reduce obvious product hazards, has been roundly rejected in nearly half of the states. Part B of the Appendix to this letter lists those jurisdictions. Moreover, several recent decisions, described in Part C of our Appendix, suggest a trend toward repudiation of the rule.

The unfairness of the rule and the undesirability of resuscitating it even in a milder form in S. 44 are patent. The obviousness of a defect should be at most but one factor in determining whether a product is unreasonably dangerous in design or formulation under Section 5(b). Plaintiff's recovery should be reduced only if he actually knew about the defect and then voluntarily and unreasonably assumed that risk.

We would respectfully urge the Committee to delete Section 10(c)(2)(A) in its present form.

Thank you very much for your consideration.

Very truly yours,

JOSEPH A. PAGE,
Professor of Law.

MARCY M. STEPHENS,
Second-Year Student.

Attachments.

APPENDIX

Part A

States that have incorporated an unreasonableness requirement into the Assumption-of-Risk defense:

1. *Alabama, Atkins v. American Motors Corp.*, 335 So. 2d 134, 143 (1976).

Driver of an automobile was killed when his vehicle was hit from behind, causing the passenger compartment to fill with burning gasoline. The Supreme Court of Alabama reversed a lower court's partial summary judgment, so that the plaintiff could attempt to prove that the car was not reasonably safe. The court validated an assumption-of-risk defense and adopted the unreasonableness requirement from Comment n to Rest. § 402A.

2. *Alaska, Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 888 (1979).

In dicta, the court noted that the defense of assumption of risk had been abolished in *Leavitt v. Gillespie*, 443 P.2d 61 (Alaska 1968), but that an unreasonableness requirement was still relevant as contributory negligence. The court noted further that "it will now be properly considered as subsumed within the concept of comparative negligence" (citing *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975) (footnote 57)).

3. *Arizona, Kavanaugh v. Kavanaugh*, 641 P.2d 258, 264 (1982).

Plaintiff, a five year old, jumped a lawnmower after it took off after being started. The lawnmower ran over her foot, so that she suffered a partial amputation of her left foot. On appeal, the Arizona Court of Appeals stated that in order to bar recovery under assumption of risk, "We must ask whether the users discovered the defect, became aware of the danger presented by such defect, and nevertheless proceeded to unreasonably use the mower in the face of such danger."

4. *California, Luque v. McLean*, 501 P.2d 1163, 1170 (1972).

Plaintiff injured his hand when it was caught in the rotary blade of a lawnmower when he slipped on a wet lawn. The Supreme Court of California reversed a decision for the defendant. The court held that for an assumption of risk defense to arise: "the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product" (quoting *Barth v. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 243, 71 Cal. Rptr. 306, 314 (1968)).

NOTE.—The California legislature's adoption of a comparative negligence doctrine does not invalidate the unreasonableness requirement. In *Daly v. General Motors Corp.*, 575 P.2d 1162, 1167 (1978), the court affirmed unreasonableness as a factor: "We think it is clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 825, 119 Cal Rptr. 858, 533 P.2d 1226)."

5. *Colorado. Hugel v. General Motors Corp.*, 544 P.2d 983, 988 (1975).

Plaintiff sued for damages resulting from the failure of a wheel attachment system of a motor home he purchased. The trial court held for the defendant; the Supreme Court of Colorado reversed and remanded with instructions requiring unreasonable assumption of risk as embodied in Comment n of Rest. § 402A.

6. *Florida. Martinez v. Clark Equipment Company*, 382 So. 2d 878, 881-882 (1980).

Plaintiff was driving a forklift in reverse when the brakes failed, slamming the forklift up against a wall. The plaintiff's foot was crushed between the forklift and the wall. The strict-liability judgment for the defendant was reversed and remanded by the District Court of Appeals. Florida's adoption of comparative negligence does not affect the unreasonableness requirement according to the court:

"Although contributory negligence by the user of a product in the sense of unreasonable use of the product after discovery of a defect and danger therein is a comparative negligence defense to strict liability in tort, it is not an absolute bar to such an action * * *."

7. *Iowa. Hughes v. Magic Chef*, 288 N.W.2d 542, 548 (1980).

Plaintiff was severely burned when buildup of propane gas in the stove he purchased produced an explosion and fire when he attempted to use it. The Iowa Supreme Court noted that the assumption-of-risk instruction by the lower court failed to state that the user must unreasonably assume a known risk in order for the defense to apply, and that the instruction was "defective in that respect."

8. *Missouri. McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652, 662 (8th Cir. 1982).

Apprentice mechanic of a concrete company was told by a truck driver to find a noise in his concrete mixer truck. A defect in the truck caused a "shear point" to be created by the truck's rotating fins. The plaintiff was seen looking into the "charging hopper" of the mixer while the drum was rotating, and was later found decapitated with his lower legs hanging over the "charging hopper." The district court held for the manufacturer and the Eighth Circuit reversed and remanded, indicating that under Missouri law a user or consumer of a product must "voluntarily and unreasonably" expose himself to the danger.

9. *Utah. Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (1979).

In dicta, the Supreme Court of Utah held that one of the two defenses to strict products liability is "knowledge of the defect by the user or consumer, who is aware of the danger, yet unreasonably proceeds to make use of the product, i.e., assumption of risk."

10. *Washington. Haugen v. Minnesota Mining and Mfg. Co.*, 550 P.2d 71, 77 (1976).

Plaintiff lost an eye when a power grinder and disc with an allegedly inadequate "heat cure" exploded, sending a piece of disc through his glasses and into his eye. The Washington Court of Appeals affirmed a lower court jury verdict for the plaintiff and specified that Comment n to Rest. § 402A was adopted by the courts of Washington. A jury instruction that included a requirement for "voluntary and unreasonable" exposure to the defect and danger as assumption of risk was validated.

Part B

The "patent danger" rule has been rejected in the following states:

1. Alabama, *Beloit Corp. v. Harrell*, 339 So. 2d 992 (1976).
2. Arizona, *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976).
3. California, *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).
4. Colorado, *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978).
5. Connecticut, *Wheeler v. Standard Tool and Mfg. Co.*, 497 F.2d 897 (2d Cir. 1974).

6. Florida, *Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167 (1979).
7. Hawaii, *Brown v. Clark Equipment Co.*, 82 Hawaii 530, 618 P.2d 267 (1980).
8. Illinois, *Derrick v. Yoder Co.*, 88 Ill. App. 3d 864, 410 N.E.2d 1030 (1980).
9. Iowa, *Calkins v. Sandven*, 256 Iowa 682, 129 N.W.2d 1 (1964).
10. Massachusetts, *Uloth v. City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188 (1978).
11. Michigan, *Casey v. Glifford Wood Co.*, 61 Mich. App. 208, 232 N.W.2d 360 (1975).
12. Minnesota, *Holm v. Spunco Mfg. Inc.*, 324 N.W.2d 207 (1982).
13. New Hampshire, *Mitchell v. Ford Motor Co.*, 533 F.2d 19 (1st Cir. 1976) cert. denied *Mitchell v. Ford Motor Co.*, 429 U.S. 871 (1976).
14. New Jersey, *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).
15. New York, *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).
16. North Dakota, *Olson v. A.W. Chesterton Co.*, 256 N.W.2d 530 (1977).
17. Oklahoma, *Davis v. Fox River Tractor Co.*, 518 F.2d 481 (10th Cir. 1975).
18. Oregon, *Askew v. Howard-Cooper Corp.*, 263 Or. 184, 502 P.2d 210 (1972).
19. Pennsylvania, *Carpenter v. Koehring Co.*, 391 F. Supp. 206 (E.D. 1975) (aff'd without op., *Carpenter v. Koehring Co.* (1976, CA 3 Pa.) 527 F.2d 644).
20. Texas, *Rourke v. Garza*, 530 S.W.2d 794 (1975).
21. Washington, *Palmer v. Massey-Ferguson, Inc.*, 3 Wash. App. 508 476 P.2d 713 (1970).

Part C

Recent state decisions rejecting the "patent danger rule" include:

1. Alabama, *Beloit Corp. v. Harrell*, 339 So. 2d 992, 997 (1976).

Plaintiff received severe injuries when first his right hand and then his left hand were caught in a papermaking machine that had no safety guards. The Supreme Court of Alabama affirmed a verdict for the plaintiff and refused to apply the open and obvious defense as a matter of law.

2. Arizona, *Byrns v. Riddell*, 550 P.2d 1065, 1068 (1976).

Plaintiff, a high school football player, received head injuries during a football game when his allegedly defective football helmet "bottomed out." The Arizona Supreme Court reversed a decision for the helmet manufacturer. With regard to the obviousness of the defect, the court said: "We do not subscribe to this 'patent-latent' distinction in the context of a manufacturer's strict liability in tort. . . . The obviousness of the defect is only one factor to be considered in the determination of whether the defect is unreasonably dangerous."

3. Illinois, *Derrick v. Yoder*, 410 N.E.2d 1030, 1037-38 (1980).

Plaintiff, a steel shifting machine operator, was injured when a recoiler picked him up off his feet by the arm, necessitating the amputation of his arm. The court stated that "the danger of unguarded rotary blades, although obvious to Dorsey, did not ipso facto preclude recovery and was but one of the factors in determining whether or not the danger was unreasonable."

NOTE.—Since *Derrick*, the Illinois legislature has adopted comparative negligence. There is no indication, however, that this will change the court's critical view of the patent danger rule (see, e.g., *Avis v. Ribar*, 85 Ill. 2d 1 (1981) (Underwood, J., dissenting)).

4. Minnesota, *Holm v. Sponso*, 324 N.W.2d 207, 213 (1982).

Plaintiff was severely injured when he hit an electrical power line while operating an uninsulated aerial ladder. The Minnesota Supreme Court rejected the latent-patent defect rule and noted that "it circumvents the state's recently adopted comparative negligence statute." The ladder manufacturer's summary judgment motion, granted by the district court, was reversed and remanded.

5. New York, *Micallef v. Miehle Co.*, 348 N.E.2d 571, 578 (1976).

Plaintiff got his hand trapped in a cylinder of printing press that had no safety guards. Plaintiff was aware of the danger of reaching towards the cylinder to chase substances that make their way onto the printing plate. However, the New York Court of Appeals stated that the "patent-danger" doctrine should not, in and of itself, prevent a plaintiff from establishing his case. Accord, *Schumacher v. Richard Shears Co., Inc.*, No. Slip Op. at — (N.Y. App. Div. June 14, 1983).

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, D.C., June 30, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science, and
Transportation, Washington, D.C.

DEAR SENATOR KASTEN: This is to submit for the record and for the Committee's consideration a comment on Section 12 of S. 44.

Section 12 sets a 25-year time limitation on liability (commonly known as a statute of repose) for certain kinds of harm caused by capital goods. The Committee Report (S. Rep't No. 97-670) on S. 2631, the immediate predecessor of S. 41, notes that "The Committee has not established a time limitation for noncapital goods nor has it established a statute of limitations for product liability actions. Thus, these issues are left to existing state law." (P. 50)

Proponents of S. 44 have often declared their intent to fashion a "balanced" bill which will provide evenhanded protection for the interests of producers and those subject to risk of harm from unsafe products. "Balance" in this regard should mean not the end result of the push and pull of competing political forces (since it is no secret that the forces on opposing sides of this legislation are far from equal), but rather a fair- and open-minded effort to address inequities which prevent injured people from recovering from the manufacturers of unsafe products as well as which impose unjust liability burdens upon producers. The most telling criticism of S. 44 is that it embraces the latter goal while ignoring the former. By failing to include a statute of limitations, S. 44 provides strong evidence that its "balance" is a snare and a delusion.

Statutes of limitations and statutes of repose place separate restrictions on product liability claims. Statutes of limitations exist in every jurisdiction and apply to all kinds of legal claims. For tort cases they generally require plaintiff to file suite within fixed period of time (generally from two to four years) from either the date of injury or the date when plaintiff discovered or should have discovered the injury.

In the product-liability context, it would seem a matter of fundamental fairness that the running of the limitations period should commence only when plaintiff has discovered, or in the exercise of reasonable care should have discovered, not only the injury but also its link to defendant's product. This was the position taken in the Department of Commerce Task Force's Model Uniform Product Liability Act, Section 110(c), which provides: "No claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due care should have discovered, the harm and the cause thereof." The commentary to the model act points out that this responds to "justified consumer concerns" and "represents the general trend in both statutory and case law." 44 Fed. Reg. 62,734 (Oct. 31, 1979).

A slightly more restrictive version of a statute of limitations would begin running when plaintiff discovered or should have discovered the harm. This would be better than the silence for which the drafters of S. 44 have opted, but might unjustifiably bar plaintiffs who realized they had suffered harm but not until later learned that the harm was product-related.

S. 44 should incorporate verbatim the language of the model act. A number of state statutes of limitations have already taken this approach. In other jurisdictions the statutes of limitations begin to run from the time of injury, but the courts have interpreted them to commence at the time the harm has been or should have been discovered. However, in at least 10 states—Arkansas, Delaware, Georgia, Michigan, Montana, Nebraska, New Mexico, New York, Virginia and Wisconsin—the limitations period begins to run from the time of injury or from the time the cause of action accrues, and the courts have refused to adopt the so-called "discovery rule" for all tort cases. The appendix to this letter provides the relevant citations.

Since uniformity and fairness are goals of S. 44, Section 12 should be expanded to include Section 110(c) of the Model Uniform Product Liability Act.

Thank you very much for your consideration.

Very truly yours,

JOSEPH A. PAGE,
Professor of Law.

MARCY M. STEPHENS,
Second-Year Student,
Georgetown University Law Center.

Attachment.

APPENDIX

Despite a growing trend in this country to expand the discovery rule to product liability cases, a number of jurisdictions continue to follow traditional accrual tests. In the following jurisdictions, for example, the state legislatures have failed to adopt a general discovery rule for product liability cases and their respective courts have been disinclined to find discovery provisions in existing statutes of limitation.

Arkansas. Ark. Stat. Ann. § 34-2803 (1979) (All product liability actions must be brought within three years after the date on which the "death, injury or damage complained of occurs.") *Faulkner v. Huie*, 205 Ark. 332 (1943) (Plaintiff who discovered more than three years after an automobile accident that his loss of hearing was traceable to the accident was time-barred from recovery.)

Delaware. Del. Code Ann. tit. 10, § 8119 (1980) (Statute of limitations is two years from the date upon which it is claimed that the alleged injuries were sustained.) *McNutt v. Delaware Racing Assoc.*, 294 A.2d 838 (Del. 1972) (Plaintiff who discovered two years after a fall that her current problems resulted from the fall was time-barred from recovery.)

Georgia. Ga. Code Ann. § 3-1004 (1982) (Injuries done to a person must be brought within two years after the right of action accrues.) *Everhart v. Rich's Inc.*, 229 Ga. 798, 194 S.E.2d 425 (1972) (A continuing tort theory was allowed but a discovery rule was denied with regard to fiberglass particles that broke loose from draperies and spread through plaintiff's home, causing illness.)

Michigan. Mich. Comp. Laws Ann. § 600.5805 (1982) (The period of limitation is three years for a product liability action.) *Sedlak v. Ford Motor Co.*, 64 Mich. App. 61, 235 N.W.2d 63 (1975) (Plaintiff who discovered more than three years after an accident that the design of a tire jack had caused a truck to fall on his head was time-barred from recovery.)

Montana. Mont. Code Ann. § 272-204 (1979) (Plaintiff must commence an action within three years.) *Much v. Sturm, Ruger & Co.*, 502 F. Supp. 743 (D. Mont.), *aff'd*, 658 F.2d 444 (9th Cir. 1982) (More than three years after an accident in which his holstered revolver discharged into his leg plaintiff discovered that the legal cause of his injury was a defect in the revolver. His action was time-barred.)

Nebraska. Neb. Rev. Stat. § 25-224 (1979) (An action for injury to the rights of the plaintiff, not arising on contract, can be brought only within four years. The cause of action accrues when the injury occurs.) *Omaha Paper Stock Co., Inc. v. Martin & Eby Const. Co., Inc.*, 193 Neb. 848, 230 N.W.2d 87 (1975) (After the statute of limitations had run, plaintiff discovered that a defective sprinkler system had been the cause of a fire which destroyed his warehouse. His action was time-barred.)

New Mexico. N.M. Stat. Ann. § 37-1-8 (1978) (The statute of limitations begins to run from the time of injury.) *Bassham v. Owens-Corning Fiberglass Corp.*, 327 F. Supp. 1007 (D.C. N.M. 1971) (Plaintiff's asbestosis claim time-barred.)

New York. N.Y. Civ. Prac. Law § 214 (McKinney Supp. 1979) (Three-year statute of limitations. Discovery rule permitted only for medical malpractice and Agent Orange cases.) *Thornton v. Roosevelt Hospital*, 417 N.Y.S.2d 920 (1979) (Plaintiff who discovered after the statute of limitations had run that a chemical injected into him resulted in the onset of cancer was time-barred from recovery.)

Virginia. Va. Code § 8.01-243 (Cause of action accrues from the time of injury.) *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981) (Court permitted plaintiff's malignant mesothelioma claim but stated that it had not created a discovery rule.)

Wisconsin. Wis. Stat. Ann. §§ 893.04 and 893.54 (West 1982-1983) (Personal injury and wrongful death actions must be brought within three years from the time the cause of action accrues.) *Neubauer v. Owens-Corning Fiberglass Corp.*, 504 F. Supp. 1210 (D. Wis.), *rev'd*, 686 F.2d 570 (7th Cir. 1982), *cert. denied*, 1033 S. Ct. 1233 (1983) (Seventh Circuit held Wisconsin law requires that a cause of action for an asbestos-caused disease accrues when the disease becomes diagnosable—a standard different from what occurrences might attract the plaintiff's attention.)

Senator KASTEN. Thank you very much, Professor. I just want to make sure. You said that if you want to come out with a good, balanced product liability bill, maybe even one that would include incentives to produce reasonably safe products, are you in favor or against Federal products liability legislation? If we had a good, balanced bill that had incentives to produce, would you be here in favor of the bill or be against the concept as well?

Mr. PAGE. I am not against the concept of a Federal bill.

Senator KASTEN. Thank you.

Let me go back to your pacemaker. It is my understanding and it is our intention that if the manufacturer had known or if the jury or the court were to decide that the manufacturer should have known that that batch was 10 percent defective, and in fact that particular person would have been able to receive some kind of compensation for the injury that he or she received. Is that your understanding?

Mr. PAGE. No, because of the definition of product. That claimant would not have been injured by a defective product under this statute because the product means any object or substance; in other words, a particular pacemaker implanted in that particular patient. There was nothing wrong with his pacemaker. He got one of the good ones.

Senator KASTEN. I might explore that further.

Mr. Brand, what kind of suits is your company experiencing and what specifically are you faced with and how would S. 44 deal with some of those questions?

Mr. BRAND. In general, we have been involved in quite a variety of suits on quite a variety of products because we make quite a variety of products. As you know, in almost every case they sue under all the theories available to them—strict liability, failure to warrant and so on.

I want to talk specifically about the strict liability aspect. As far as I know, all of the States, if not almost all of them, use the theory of strict liability, but all of them in a little bit different way. As we sit there in Iowa selling products in all the various States, it is very difficult and in fact confusing and almost impossible for us to totally comprehend how each of these States are going to judge our product based upon their use of strict liability.

Now some States interject the theory of conduct or negligence into strict liability actions. However, others do not. I understand that in some jurisdictions if a product is so-called defective and the defect causes the injury, even though the defect was not knowable at the time it was designed and manufactured the manufacturer is liable for the damages. That is, from our perspective, completely unmanageable.

It is completely unrealistic. We are human. We cannot foresee everything that might happen in the future. I just believe that there must be some reasonable limitations on what our expectations, or what expectations the courts have of us with respect to the design of our products.

Senator KASTEN. I would like for both you and Mr. Head to respond to Professor Page's suggestion that what we need to include here somehow are incentives to produce reasonably safe products and particularly the opposite of that question. There are some people who have been maintaining that because we can use the 1960 crane or car or whatever as evidence—excuse me.

We can use the 1980 improved product, that the 1960 product was somehow unsafe, I think all of us want to have incentives to produce reasonably safe products, but are there examples, Mr. Brand or Mr. Head, in which we have found the system to be in fact an impediment to producing reasonably safe products? Has the cost of product liability insurance or considerations of product liability questions caused your firm to be less enthusiastic about developing new product lines, less enthusiastic about making certain kinds of improvements?

Mr. BRAND. I would like to address the question of subsequent design improvements. At Vermeer we have a policy that if a design change needs to be made we make it. We do it, though, with sometimes fear and trembling as to how that subsequent design change will come back and affect possible outcomes of cases or possibly in the future cases that will be litigated.

Although I do not have any facts to back this up, I do have a fear that with some companies there may be situations where necessary design improvements will be postponed or not undertaken at all because of this threat of those changes being used in pending litigation. So in fact the present system has disincentives to innovation and product improvements.

Senator KASTEN. Mr. Head?

Mr. HEAD. I would simply underline that. The whole bill will be an incentive for safer products by clarifying subsequent changes. Sometimes the very existence of this confusion out there has caused us to get out of product lines that are necessary for our economy.

This bill would go into a uniform understanding for manufacturers like us as to what is going to happen from State to State. The famous *Crane* case gets thrown around. We may make a large judgment in one case on the set of facts backing into a powerline, you do not in another.

The consumers in the various States end up paying for that lack of uniformity and this would go a long way to correcting that, and that would be good for consumers.

Senator KASTEN. You said you agreed in general with the statement. Can you give specific examples where your firm or firms you know of, have been less than enthusiastic or in fact have decided against improving a product or product line?

Mr. HEAD. I think they probably have been cautious. We are always looking to improve. I will not say we do not, but we are much more conscious.

Senator KASTEN. I recognize that is almost an impossible question for a manufacturer to ask in this circumstance.

Professor Page?

Mr. PAGE. Just a quick comment. What I meant by my statement was there are already provisions in this bill which do provide greater safety incentives in certain States for manufacturers. That is, there are improvements over existing State law and existing State liability statutory law.

For example, there are in a number of States very restrictive statutes of repose that cut off liability at a very early date and therefore provide disincentives to manufacturers to build long-term safety into their products. This bill creates a greater safety incentive with your section on statutes of repose.

The only point I was trying to make is that I wish you would have a section of the bill declaring your purposes and put that in there, that one of the things you want to do is increase safety incentives to improve general safety of products within reasonable limits.

Senator KASTEN. I appreciate your suggestion. I think there may be ways of incorporating that concept into part of the legislation and we will explore that and hopefully work with you in our exploration.

I want to thank all of you for your participation this morning on this panel and, in fact, all the members of the panel. There may be additional questions that will come to you and we ask that you respond to the questions in writing.

Thank you very much. The committee is adjourned.

[Whereupon, at 12.18 o'clock p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

PRODUCT LIABILITY ACT

WEDNESDAY, APRIL 27, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9.40 a.m., in room SR-253, Dirksen Senate Office Building, Hon. Robert W. Kasten, Jr. (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Today the Consumer Subcommittee of the Senate Commerce Committee will hold its sixth day of hearings [4 days last year] on the Product Liability Act, a bill which would establish uniform product liability law in the United States.

As many of you are aware, S. 44 represents the culmination of several years of effort to develop uniform product liability legislation. The Product Liability Act is identical to S. 2631 as reported favorably by the Senate Commerce Committee on October 1, 1982. That legislation, in turn, was based on a series of draft proposals which were widely circulated for comments. The result is a balanced bill which will give clarity and structure to an area of the law that has been riddled with conflicts and confusion.

Today's hearing was called at the request of the distinguished ranking minority member of the committee, Senator Hollings, and I understand that Senator Hollings will be joining us momentarily. I understand that Senator Hollings is opposed to parts of our Federal product liability law, and a number of witnesses appearing here today will express concern about the legislation.

We have done our best to accommodate Senator Hollings' interest in the scheduling of witnesses for today.

I plan to pay close attention to the views expressed here, and hope to work with the ranking minority member, and will continue to work with all interested groups to insure a fair and a balanced product liability bill. I think the effort at compromise, particularly with Senator Hollings, is going to be important to our overall success.

The subcommittee's extensive hearing record demonstrates that we are facing a product liability crisis of such proportions that it has become a tremendous burden on interstate commerce. Today, every businessman, every insurer, and every injured person seeking to recover is confronted with an unbelievable variance in the rules that must be followed in the area of product liability.

This great divergence in the rules results in a waste of judicial resources and excessive legal costs as well as the inability of product manufacturers to meet their responsibility for safety. High litigation insurance costs are passed on to consumers in the form of higher prices for products.

Insuring the safety of products is not simply a State interest. It is a national concern. Individual States cannot adequately achieve this goal. The law in the area of product liability is generally created by judges. As a result, the law varies from State to State and within one State from court to court. The law is constantly subject to change from case to case.

Product liability bills that have been passed by many States have not been beneficial to consumers. Under many such bills, the rights of individuals seeking to recover are often limited, for example, by short statutes of repose that restrict consumers' ability to bring a claim. Nor do State statutes benefit manufacturers, who ship approximately 70 percent of their goods into other States.

I am a firm believer in States rights, but I believe that product liability is absolutely a matter of interstate commerce, not of States rights. Matters like this are precisely why we have a commerce clause in the U.S. Constitution.

I have been pleased with the growing support for the Federal product liability legislation. As a matter of fact, since our last hearing, which was only 3 weeks ago, we have added three new cosponsors to the overall bill, so the bipartisan support continues to grow. The concern across America continues to grow, and as more and more people become aware of the problems that we are faced with, more and more people are joining in our effort.

I would like to take this opportunity to welcome Senators Weicker, Armstrong, and Pressler as new cosponsors. I believe that this support reflects a recognition and an understanding of the magnitude of the product liability problem and the need for Federal legislation. I am hopeful that we will be able to move this legislation expeditiously to a vote in the Senate within the next few months.

I would like to welcome today's witnesses. The first witness will be the Honorable James T. Broyhill, U.S. House of Representatives. Jim, let me thank you for joining us today, and I also understand that you have other responsibilities across the way, and we very much appreciate your participating in these hearings today.

**STATEMENT OF HON. JAMES T. BROYHILL, U.S.
REPRESENTATIVE FROM NORTH CAROLINA**

Mr. BROYHILL. Mr. Chairman, I thank you very much for the opportunity to appear, and I would like to ask at this time that you put my statement in the record, and I will attempt to summarize for just a few moments.

Senator KASTEN. It will be done.

Mr. BROYHILL. I do have a markup in our committee, on the Energy and Commerce Committee on the House side, with a number of important bills. One of them is the Consumer Product Safety Commission amendments which, of course, relate to this particular issue. As you well know, we worked on that issue, the

Consumer Product Safety Commission, back in the early and mid-seventies, together.

I do want to thank you and commend you for your efforts and continuing efforts in pursuing the legislation that will address the worsening of the product liability problem. As a result of your continued leadership on this issue, we are moving toward the enactment of fair and balanced Federal law that does effectively address the problem.

As you know, my work in this area goes back a few Congresses. Back, for example, in the 96th Congress, former Representative Richardson Pryor, and I held several days of hearings, on at that time, the existing product liability system, and we clearly found as a result of those hearings that the existing product liability system did impose a heavy burden on interstate commerce.

We had witness after witness that came before our subcommittee and testified to the confusing, the conflicting, constantly changing liability standards and, of course, that these changed and varied from State to State, sometimes even from court to court within a State.

You indicated in your opening statement that this is a national concern, and certainly it is. Manufacturers, of course, often sell their goods, their wares and products in all 50 States, and they often find it very difficult, if not impossible, to know what their responsibilities are in manufacturing, design, labeling, or selling of their products, and, of course, they do have to devote substantial resources to try to sort these things out.

As you know, whenever there is uncertainty, and wherever there is the unknown, it is going to result in increased cost to deal with that uncertainty, and oftentimes we found in those hearings that manufacturers were even reluctant to bring out a new product, because of that uncertainty or unwillingness to deal with the unknown.

So, our hearings did reveal that these varying rules, these varying standards, that they did greatly increase the cost of manufacturing as well as insuring the cost of—the potential cost of the liability on those products in interstate commerce. So, we also found that these increased costs hindered the American industry's ability to compete with foreign manufacturers, and also contributed to unemployment, that it discouraged technological innovation, new product development, and raised the prices to the American consumer.

We also found in our hearings that the plaintiff's share of the total pie was often and is less than the cost of the rest of the system, the cost of the legal fees, the witnesses, and the court costs, and so forth. So, as a result of those hearings, Representative Pryor and I introduced legislation, H.R. 7921, and as your report of last year's legislation indicated, this bill served as the foundation for the development of S. 44.

My testimony today, Mr. Chairman, is really very short and simple. Since that time, in my estimation, the problem has grown worse instead of moving toward some uniformity in the law on product liability, and trying to develop some certainty. It seems to me that the States and the courts have tended to diverge, and the costs continue to skyrocket.

It is threatening the survival not only of small businesses but of large corporations as well. So, it seems to me it is time that we deal with this problem. The present system obviously is unfair to consumers. These burdensome costs are passed on to consumers, but also the fact that the current situation often discourages manufacturers from attempting to come up with new technology or attempting to improve their products.

Sometimes, for example, the State courts have permitted the evidence of postaccident design changes to be used as evidence of defectiveness of the product, so oftentimes manufacturers are reluctant to improve their product safety unless they are certain that these modifications will decrease the number of accidents.

So, it seems to me that our laws should encourage the attempts to improve product safety, not discourage them.

You are, of course, Mr. Chairman, well aware of these and other problems as a result of your intensive investigation into this overall problem, your lengthy hearings, and I think that these and other problems are effectively addressed by S. 44. I am pleased that there is a growing consensus in the Senate, and I can report that there is a growing consensus on the House side for the need for legislation in this area.

Representative Waxman—he is the chairman of the subcommittee that has jurisdiction of this on the House side—though he is not indicated with any specificity the type of legislation that he would support, has indicated that he would be willing to work with me and the others to develop a uniform Federal product liability law that would address some of these issues and concerns that we all have.

Chairman John Dingell, chairman of the full Committee on Energy and Commerce, has also shown an interest in this problem. Just recently, Representative Barbara Mikulski, a member of our committee on the majority side, has cosponsored H.R. 2729, which was introduced just a few days ago by our colleague, Representative Norm Shumway.

Representative Ed Madigan, who is the ranking minority member on the House Subcommittee, he has asked me to report to you that he also stands ready to work with our colleagues on the House side to try to resolve this issue.

So, thank you for your leadership in moving ahead on this side with this bill. As soon as you finish your good work, then we would hope to follow soon after with our legislative efforts on the House side.

Senator KASTEN. Jim, let me, first of all, thank you. I know you have to go back, so we will not go through a lot of questions today, but thank you for your help, your leadership. It is clear to me the support for this legislation is growing. It is bipartisan support. It is bicameral support. We are now up to 17 cosponsors here.

As you know, we have been working with and talking with a number of people on the House side, and I am confident now that this support will continue to grow and mushroom as the recognition of the problem becomes more and more widespread, but thank you very much for your help.

And also, as you know, our legislation is built on the work that you have done in the past, and I want to thank you very much for

kind of laying that base or establishing that framework that we have been able to build on through these various staff drafts.

Thank you very much for your testimony.

Mr. BROYHILL. As you know, the court decisions have moved on, so your bill is addressing the problem as the problem is now defined in a much larger way, but we have other concerns out there, so your bill, though it has a lot of similarities to ours, it has gone beyond that, and also a number of compromises that I think are in the public interest.

Senator KASTEN. Thank you very much, Congressman Broyhill. [The statement follows:]

STATEMENT OF HON. JAMES T. BROYHILL, U.S. REPRESENTATIVE FROM NORTH CAROLINA

Mr. Chairman, members of the subcommittee, I greatly appreciate the opportunity to testify before you today on S. 44, the "Product Liability Act." I commend the Chairman for his diligent efforts in pursuing legislation to address our country's worsening product liability problem. As a result of your leadership on this issue, Mr. chairman, the legislative work on product liability reform—which had begun in previous Congresses—has continued, and we are moving toward the enactment of a fair and balanced Federal law that effectively addresses the product liability problem.

When the House Energy and Commerce Committee first focused on this issue in the 96th Congress, it became apparent during our twelve days of hearings that the existing product liability system was an intolerable burden on interstate commerce. Witness after witness testified to the confusing, conflicting, and constantly changing liability standards which varied from State to State and sometimes even from court to court within a State.

Manufacturers—many of whom sell their products in all fifty States—found it virtually impossible to know their responsibilities in manufacturing, designing, labeling and selling their products. They were compelled to devote substantial resources to deciphering these various State standards in order to insure that their products complied in as many States as possible—and even then a court in any given State might come up with a new and totally unpredictable theory of liability which applied retroactively to their products.

Our hearings revealed that these varying rules and standards greatly increased the costs of manufacturing and insuring products in interstate commerce. These increased costs hindered American industry's ability to compete with foreign manufacturers, contributed to unemployment, discouraged technological innovation and new product development and raised prices for American consumers. Furthermore, our hearings revealed that the confusion in the product liability system resulted in an explosion in the costs of bringing and defending lawsuits. These transaction costs increased to such an extent that an injured plaintiff actually received less in compensation for his injury than the amount it cost to transfer that compensation to him.

As a result of those hearings in the 96th Congress, former Democratic Representative Richardson Preyer and I introduced H.R. 7921, the "Product Liability Act of 1980," which sought to provide uniform Federal standards of product liability law, and which—as the report accompanying last session's predecessor to S. 44 points out—served as the foundation for the development of S. 44.

Since the time that we introduced H.R. 7921, Mr. Chairman, the product liability problems has grown worse. Instead of moving toward uniformity in the law of product liability, the States have continued to diverge. Although 32 States have enacted statutes relating in some manner to product liability, no two statutes are the same, and none deals with the issue in a comprehensive manner.

Costs which are attributable to this morass of standards continue to skyrocket, threatening the survival of not only small businesses, but also large corporations and even entire industries. Transaction costs under the present system have increased to the point that for every 66 cents received by an injured plaintiff, 77 cents is expended in transferring that money to him.

Since the bulk of these transaction costs are composed of attorney fees, it should come as no surprise that some attorneys have an interest in continuing the confusion of our present system. But this system is not fair to their clients, for it is as difficult for plaintiffs to understand their rights as it is for defendant manufacturers

to understand their responsibilities. The present system that governs recovery for product-related harms resembles nothing so much as a lottery, where one's chance of recovery can be totally unpredictable, and where the outcome of a lawsuit is affected more by where the injury occurred than by the merits of the case.

In States, for example, that have attempted to apply liability without fault in cases alleging a design or failure to warn defect the standards given to the jury by the court are so vague as to be meaningless, and the jury is forced to rely on irrelevant factors to determine whether or not a plaintiff can recover. In such design and warning cases, the standard of conduct for the manufacturer should be governed by the traditional and readily understandable tort test of reasonable prudence; that is, did the manufacturer act with reasonable prudence in designing or warning about his product?

The present system is also unfair to consumers. Not only are the burdensome costs of the current system inevitably passed on to them, but current law also discourages a manufacturer from attempting to improve the safety of his product. Since some State courts have permitted evidence of post-accident design changes to be used as evidence of product defectiveness, manufacturers are reluctant to attempt to improve product safety unless they are certain that such modifications will decrease the number of accidents. Our laws should encourage attempt to improve product safety, not discourage them.

These and other problems are effectively addressed by S. 44, Mr. Chairman. I am pleased that there is a growing consensus in the House on the need for a uniform Federal Act such as that represented by S. 44.

Representative Henry Waxman, the chairman of the Health Subcommittee where such legislation will originate, has assured me that he supports the enactment of a uniform Federal product liability law and that we will address this issue following action in this body. Chairman John Dingell of the full Committee on Energy and Commerce has also shown an interest in the enactment of such legislation. Representative Barbara Mikulski, a majority member of the Health Subcommittee, has cosponsored H.R. 2729, introduced this past Monday by Representative Norman Shumway, which also provides for a uniform Federal product liability law. Representative Ed Madigan, ranking minority member on the Health Subcommittee, and I stand ready to work with our colleagues in the majority on this issue.

Thank you again, Mr. Chairman, for this opportunity to state my views on this issue, and for your strong and effective leadership in addressing this critical problem.

Senator KASTEN. The next witness will be Senator Dennis D. DeConcini, speaking on behalf of Governor Babbitt.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA

Senator DeCONCINI. Mr. Chairman, thank you very much.

Senator KASTEN. Dennis, greetings. Good morning. We understand you are speaking on behalf of your fine Governor this morning, and we are pleased to have you in his behalf.

Senator DeCONCINI. I want to thank you for the privilege of letting me appear here today on behalf of Governor Babbitt of Arizona. The Governor had hoped to be here in person, but the Arizona Legislature is in session, keeping him in Arizona. I hope you will accept his apologies.

I shall not try to summarize his statement, but I would like to leave it with you, Mr. Chairman, and ask that it be put in the record. I urge the chairman and the members of the subcommittee to review this testimony; I think it will be enlightening.

The Governor's position is in opposition to S. 44, the Product Liability Act. As a former attorney general of Arizona, Governor Babbitt is intimately familiar with the strengths and weaknesses of product liability laws and the issue of whether this is a matter best left to the States.

I would like to point out that the National Governors' Association, the Conference of State Legislators, and the Conference on State Chief Justices, are also opposed to this legislation. In fact, I am not aware, Mr. Chairman, of a single organization of State officials which has endorsed the proposal.

Like Governor Babbitt, I share some of his reservations about S. 44. I applaud the intent of the committee, but question whether the law will have the intended effect of reducing the cost of insurance by reducing the cost of litigation. The pending legislation has also been criticized as unduly compromising the right of consumers in an effort to streamline and reduce litigation.

Historically, the Congress has usurped the States in areas where there was both a need for positive action and a lack of political will. In the case of product liability, however, the majority of States have acted. Indeed, some States have passed laws which provide the consumer with better protection than he or she will receive under S. 44.

I for one have opposed the trend of centralizing more and more political control in the Federal Government. I think it is healthy for the States not only to be encouraged, but allowed to regulate affairs within their borders. There are cases, of course, as we all know, where the need for Federal law is overwhelming. I do not believe such a case has been made, at least as of yet, for product liability.

The stated benefits associated with federalizing the product liability law is a reduction in litigation. Business Insurance, the magazine, in its July 1981 issue, indicated that some insurers believe that product liability trends change so fast that they doubt whether any one piece of legislation can cut down on the litigation.

I am confident that the legal profession will continue to find ways to litigate, and that in a relatively short time we will be back to square one. In the meantime, however, we will have unnecessarily usurped the State in an area where they have acted responsibly, and shortchanged the consumer in the long run.

This committee has historically done an excellent job of protecting consumer rights. Your recent action in reporting the Consumer Product Safety Commission reauthorization to the full Senate is but one example of your dedication to the goals of consumer protection. Therefore, I would urge this subcommittee to carefully consider how the rights of the consumer to recover damages might be adversely affected by the bill.

At any rate, Mr. Chairman, I commend Governor Babbitt's testimony, and I want to thank you and commend you for doing what you believe is right in this area. I also want to thank you for your experience and your cooperation on the Appropriations Committee and other places. I know you will take this testimony of the Governor and others and weigh it heavily in your determination and reporting of the bill.

Thank you, Mr. Chairman.

Senator KASTEN. Dennis, thank you very much for appearing on behalf of your Governor. We certainly will take into consideration the various elements that you have discussed. Thank you for your testimony.

[The statement referred to follows:]

STATEMENT OF HON. BRUCE BABBITT, GOVERNOR, STATE OF ARIZONA

Mr. Chairman, Members of the subcommittee, I appreciate this opportunity to submit testimony on S. 44, which would establish a Federal uniform product liability statute.

Few areas of tort law have been the source of such continuous and lively debate as product liability. Throughout this century, jurists have struggled with the problems of balancing the rights and obligations of producers, sellers, and users of defective products which are implicated in injuries to workers or consumers. Today, with the continuing growth in the number and complexity of products in the marketplace, that balancing act has necessarily become more difficult—and more controversial.

The controversy has reached a new peak in the current dispute over this bill. The battle lines are sharply drawn. Proponents argue vigorously that differences in state laws governing product liability prevent manufacturers in interstate commerce from operating predictably or knowing their responsibilities and obligations in each jurisdiction—leading to skyrocketing insurance and legal costs, and negative impacts on product development, innovation, and risk-taking.

Opponents charge equally forcefully that the proposed federal statute would drastically curtail the ability of consumers to win compensation for product-related injuries, thus diluting the deterrent value of current law, and weakening manufacturer's incentives to design for safety.

I enter this discussion from a different perspective, and with a different set of concerns. Submerged in the debate over the specific provisions of S. 44 are important questions of federalism which should concern all those who worry about the erosion of state responsibilities and obligations through the indiscriminate exercise of federal power.

For over 200 years, tort law has been the province of the states. As Governor of a state which has recently enacted product liability legislation, I strongly believe that the proponents of a federal statute—the advocates of change—shoulder the burden of proof. Before Congress moves to consider any specific legislation in this area, the advocates of federal intervention must clearly show a pressing national interest in product liability law, and then explain how federal legislation will help further that interest. In the case of S. 44, I believe the argument is not very persuasive.

First is the problem of establishing evidence of the need for a federal product liability law. The bill itself gives us few clues. The draft of S. 44 now under consideration contains no findings section (in which the factual basis for legislation is usually detailed), and no statement of purpose (other than the very broad one of "regulating interstate commerce").

Lacking an explicit statement of the problem in the legislation itself, it's necessary to look elsewhere.

Supporters of uniform product liability legislation inevitably trace the need for federal action back to the so-called "product liability crisis" of the mid-1970's—a period during which many manufacturers experienced sharp increases in product liability insurance rates. At the time, insurance carriers attributed the increases to a sudden surge in product liability lawsuits. Manufacturers pleaded for relief, leading to a spate of legislative activity at the state level and the creation of a presidentially-appointed Interagency Task Force on Product Liability.

In an exhaustive report released in November, 1977, the Task Force for the first time provided a statistical base from which to embark on an analysis of the product liability problem. The results were as noteworthy for what they *didn't* find as for what they did.

During the early 1970's, many insurance companies predicted that product liability claims would soon skyrocket from annual levels around 50,000 to over 1 million per year. The Task Force estimated the number of claims filed in 1976 at between 60,000–70,000, hardly a massive increase. Today, the number is estimated at between 60,000 and 140,000. While certain high-risk industries had indeed experienced significant increases in their product liability insurance rates, the average cost of product liability insurance was found to be less than one percent of sales in most of the industries studied.

More significant were the reasons identified for these premium increases at the heart of the product liability "crisis": subjective and irrational insurance rate-making practices, previous misjudgments regarding appropriate product liability premium levels, unsafe manufacturing practices, increasing complexity of products, heightened consumer awareness and willingness to seek legal redress, expansion by courts of the rights of injured plaintiffs, and inflation.

While recommending some changes in the tort litigation system, the Task Force's Legal Study (Vol. III, at 126) stated that:

"The overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, *no* inequitable doctrine or group of doctrines, even if changed immediately, could produce a greater availability of or lower cost for insurance" (emphasis in the original).

In sum, while substantiating that a significant problem of insurance availability existed for certain firms in certain industries (e.g., medical devices, pharmaceuticals, power lawnmowers, industrial chemicals and metal castings), the Task Force was unable to conclude that the problems constituted a crisis of the dimensions claimed, or that they could be directly mitigated by changes in tort law.

Unable to demonstrate empirically the need for federal product liability legislation, supporters of S. 44 are left defending the idea of "uniformity" in product liability law for its own sake. Meanwhile they ignore the crucial question. Even if variations in product liability law between states were found to be responsible for uncertainties in the marketplace for insurance, would federal legislation—no matter what standards it were to establish—produce the desired stability?

There is little reason to think so. In fact, it is perfectly possible that federal legislation would create greater uncertainty and inconsistency in the law than now exists.

Each state would construe the law according to its own lights, with resulting wide variations. There would almost certainly be a large amount of litigation; most observers believe that the U.S. Supreme Court would be extremely reluctant to establish the desired uniformity by granting *certiorari* in these cases.

Areas not covered by the statute would be treated differently, resulting in even more confusing and inequitable results. What happens if an accident is caused by the combined negligence of several, individual parties as well as by a defective product? In attempting to allocate responsibility for the resulting injury among the various parties it is absurd to expect a court to utilize federal standards for one defendant while imposing state law on all the others.

Nobody would deny the tremendous complexity of product liability law or that standards do vary between states, but these facts alone do not create a convincing case for federal preemption of state activity in this area.

The development of tort law during the last 200 years reflects the slow evolution that can best be achieved through court-created case law. Product liability law has developed through a cautious, deliberative process, reflecting the gradual adaptation of the law to changing concepts of justice and social responsibility.

In an extremely complex and controversial area of the law, the diversity represented by product liability doctrines developed in state jurisdictions can be considered a strength rather than a weakness. Today, a variety of doctrinal approaches are in use around the country (although the differences among the states has been exaggerated). In product liability, as in other areas, the states are truly serving as "laboratories of democracy", to use Justice Frankfurter's phrase—testing and refining concepts, borrowing that which is sound and rejecting what is not.

The conflicting opinions expressed by legal experts in recent hearings regarding the fairness and utility of a Uniform Product Liability Act suggest that there is little consensus about the preferred direction of change in product liability law. Yet the proponents of S. 44 are prepared to ignore almost two centuries of tort law and substitute their own judgment for that of the judiciary in the fifty states. At best, this represents a misguided exercise in federal power; at worst, a disturbing lack of respect for state legislative and judicial decision-making.

Given the President's commitment to a "new federalism", and his repeatedly expressed desire to reduce the burden of federal regulation and eliminate federal interference in issues of state sovereignty, it is hard to understand why the Administration has not opposed this bill. A federal law with no federal question jurisdiction—a law which must be enforced by the states in state courts—is plainly and simply inconsistent with sound principles of federalism.

Simply put, I believe that the proponents of S. 44 have failed to prove their case for usurping state authority in the product liability field. The pressing national need for product liability reform has not been demonstrated, nor has it been shown that the states are not dealing adequately with the problems that do exist.

The development of tort law through the common law process at the state level has served this country well. Its principal purpose has always been and should continue to be to address the grievances of those who have been wronged. Federal uni-

formity, however attractive conceptually, is not necessarily consistent with this goal, and should never be allowed to become the guiding force behind tort reform.

I urge the members of the Sub-committee on Consumers to preserve state sovereignty in the important area of product liability law by voting not to recommend passage of S. 44.

Thank you very much.

Senator KASTEN. Our first panel this morning includes Mr. Specter, Mr. Van Dongen, Mr. Asch, Mr. Brown, and Mr. Connor.

Gentlemen, we have a crowded schedule this morning, and it is my intention to work with the system of green, yellow, and red lights with a bell so that we can stay roughly on the schedule that we have agreed to in the past.

So, the first statement will be from Mr. Howard Specter, who I understand is accompanied by Mr. Thomas Bendorf. Mr. Specter.

STATEMENTS OF HOWARD A. SPECTER, PRESIDENT, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, ACCOMPANIED BY C. THOMAS BENDORF; DIRK VAN DONGEN, PRESIDENT, NATIONAL ASSOCIATION OF WHOLESALE-DISTRIBUTORS, ACCOMPANIED BY LOUIS R. MARCHESE, COUNSEL; AND VICTOR E. SCHWARTZ, COUNSEL, THE PRODUCT LIABILITY ALLIANCE; KARL ASCH, COUNSEL; JOHN P. BROWN, PRESIDENT, JOHN BROWN & CO.; AND MARTIN F. CONNOR, COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. SPECTER. Good morning, Mr. Chairman.

It is my privilege to appear on behalf of the Association of Trial Lawyers of America. I am the president of that association of 50,000 members.

I thank you again for what has become an annual invitation to join you to discuss the preservation of victims' rights under the common law of product liability. I hope to be invited back again next year, and again during the next Congress, and perhaps again thereafter.

You have described what you perceive to be a dreadful problem of national significance. In the 5 precious minutes which you have graciously allotted our association to discuss this important, critical topic, I would like to discuss a subject which cuts across every and all considerations of the bill. It is a consideration which leaps out from the pages of the bill at any sensitive observer.

That subject, which is one of the bill's key failings, is indifference. If there is such a thing as studied indifference, this bill has achieved it.

We, the Association of Trial Lawyers of America, are appalled at the proponents' arrogant indifference to the accumulated knowledge, wisdom, and experience of the legislators, judges, and Governors of the 50 States and the other jurisdictions whose laws and citizens' rights this bill would have the Federal Government swallow.

It is impossible to believe that anyone truly believes that the Congress of the United States, even with all of its admitted wisdom, knows more about the delicate tensions and issues inherent in this subject than do the officials charged with dealing with this subject in the States.

I do not know where this Federal venture will lead, but I suggest to you that if you like this bill, you will love Federal workers' compensation legislation. I suspect that that is your next step.

We are appalled, too, at the proponents' studied indifference to the cherished history and development of the common law of product liability, a body of law which has developed over centuries on a case by case, person-by-person basis. Apparently that kind of individual analysis is too humane, too studied, too progressive, too kind, too altruistic, too everything good and American for this nation's dangermakers. We should for their sake deteriorate to the level of an east European code country. I hope not.

We are appalled, too, at the proponents' callous indifference to the rights and the plights of today's and tomorrow's victims; innocent, injured victims of defective products. These unfortunate people, whose human touch and presence are singularly and strikingly absent from the pages of the bill, are already disadvantaged more than enough.

They are disadvantaged by their injuries, their inability to battle collectively, as do their adversaries and their insurance carriers, by the small sizes of their pocketbooks, and by a system which already imposes on them a heavy legal and factual burden of proof.

Anyone who has represented an injured person in the battle called a product liability trial has struggled against the costly uphill burden of meeting and attempting to overcome the resources of industry's might, money, and manpower. Ultimately, the proponents would eliminate even the right to join in that battle.

Finally, we are appalled, but no longer surprised, at the indifference—no, more, really—the greed and the power of an insurance industry which has forsaken its role of servant and protector in an obscene quest to assume the role of power broker and master.

We hope that you, too, will not be indifferent.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. Chairman, uniformity in the operation of injustice is no virtue. Diversity in the search for justice is no vice.

We appreciate the opportunity to appear before this Committee again in our continuing effort to preserve and, in preserving, to enlarge upon the principle that the person of every American shall be secure against the tortious conduct of any other.

My name is Howard Specter. I am the President of The Association of Trial Lawyers of America. Our membership, which now exceeds 50,000 consists principally of those who seek redress for the wrongs committed upon some of our citizens by those who are negligent or indifferent to the rights of others. We represent plaintiffs. We are retained when victims find themselves without other recourse. We are paid when society agrees that those victims deserve the recourse and reparations that they sought.

The various associations of producers of defective products are wont to describe strict liability as absolute.

Strict liability allows recovery without the necessity of demonstrating that negligence produced the defect. Strict liability still requires for recovery the following elements.

1. A defective product; 2. that it was the defect in the product that caused the harm; and 3. damages.

That does not seem like a very liberal rule of law. That does not seem to uncertain. The proposition is simple and uniform. The supporters of this legislation want more freedom from the consequences of manufacturing and marketing defective and harmful products.

Any effort to cause less harm can result from the desire and individual actions of each manufacturer. However, the desire to be freed from the consequences of the harm has resulted in the awesome concentration of America's industrial might directed toward their working their will to a single end. The result would be the end of a body of common law as we know it.

What is the effect?

"Law, which is to govern life, must need be as able to change with the circumstances as the life which it is to govern." Roscoe Pound.

Over the centuries, there has been a cool, pure stream of progressive, humane development of expanded recognition of the societal valuation of human rights. This stream is nourished by legislatures responsive and responsible, by courts and juries, and by the vitality of our system of common law. The common law must be free to respond to the needs of a society devoted to recognizing and knowing the dignity and worth of the individual.

What distinguishes our common law from the code countries of Eastern Europe is the importance we attach to the derivation of our law in adjudicated cases and controversies and, of course, the value we place on human life and personal dignity.

In code countries, nothing is law, in the full sense, that has not been written down in exclusive textual form and enacted by the State. A civil-law lawyer or judge, faced with a particular problem or controversy, must locate his answer somewhere within the four corners of the authoritative code. We rely more heavily on our creative problem-solving abilities.

Our primary tools, under the common law, are the precedents of similar cases. Some of those decisions draw their strength from the pure authority of judicial hierarchy; others, from the sheer force of merit and persuasion. The result is a vibrant and vital body of law, carefully balancing the conflicting needs of the day as reflected in that day's disputes. Those who would seek to destroy the system which results in that balance, and who would do so in the name of "restoring" some balance, must be deemed to have rejected what the centuries have taught.

Today, the proponents of codifying the common law of torts are not complaining of stagnancy in the courts. What they challenge is a dynamic enterprise whose end-product is growth in our concepts of social responsibility and individual worth. The effort to codify is the effort to strangle that growth and to undo it, not to foster or renew it.

Let us examine more closely the dangers of federal codification of common law.

The initial danger is simply that the Congress will not do a very good job of it. Perhaps it cannot in today's political climate. It is almost a certainty that complex bodies of law will not be treated comprehensively. Besides those aspects of the problem which are overlooked or unforeseen, there are those which present such controversy or difficulty that they are simply excised in the interest of political expediency. In the instance of product liability "tort reform," we have already seen issues which comprise an integral part of modern product liability law dropped from consideration in an attempt to recruit or retain support for the bill, to weaken the stands of its opponents, or just to get the bill moving.

Compromise of other sections will be sought but, if not forthcoming, they too will be sacrificed to the overall effort. The intended comprehensive declaration of "certain" law will serve only to confuse, creating a new partial body of inflexible rules which will have to find its place in that which remains of the dynamic law.

A second danger of codification is suggested in a comparison of the legislative and judicial processes. When it comes to defining the careful balancing of the rights among men, the legislative process, characterized by its lurching, sometimes stalled, sometimes hurried schedule, cannot equal the deliberative judicial consideration of the merits of each case. Another, starker contrast is the difference between the abstract nature of the legislative inquiry and the concreteness of the judicial. The preference for the latter as a catalyst for justice is embodied in the constitutional precept of "case or controversy," and remains a strong tenet of the principle of judiability. Dean Pound writes in *The Task of Law*:

"Herein is the kernel of truth in the historical jurist's distrust of conscious law-making and the lawyer's distrust of legislation. Abstract formulation of rules is likely to result in empty formulas because there is only a speculative interest in them as propositions, not the living interest on the part of individuals, whose interests are affected directly and immediately by the enforcement or non-enforcement of the rule, which brings controversies before courts and results in a common law."

A third danger of codification is that mistakes, even if acknowledged, are very difficult to correct. The first rumblings of the product liability "crisis" were heard during the equally unfounded medical malpractice "crisis" of the mid-70's. Congress opened its product liability inquiry in September 1976. More than six years later,

product liability "tort reform" had just cleared its first committee action. The opposition cannot take credit—inertia played a heavy role. The Risk Retention Act, on which almost everyone agreed, took two Congresses to pass. What is the likelihood of any federal bill being amended in the absence of a sheer emergency? After years of effort, the bankruptcy code was "reformed" in 1978. It took until mid-1982 for the case to be perfected which resulted in the Supreme Court declaring it unconstitutional. In recognition of the problems which would accompany an unplanned return to this matter, the Court gave Congress until October 4, 1982. That date came and went. The deadline was extended, but Congress passed it again and the order went into effect. Congress may not be able to resolve the matter by enactment at all. Further, unlike an appeal to a higher court, an attempt to amend or repeal a code enactment is no more than a request to the legislature to reconsider what it has done.

The fourth and most ominous danger of codification is the danger of rigidity. The rigidity of codification stems both from how difficult it would be to amend and from how it would reduce our adjudicating bodies to automatons, collecting facts through the slots at the top, running them through the code's mechanical analysis, and dispensing justice below.

Speaking at a conference on product liability "tort reform" a year ago, Professor John Wade, who is best known for his work on the Restatement of Torts (Second), had this to say:

"Legislation can have the effect of stultifying the continuing development of the law, and preventing the courts from adopting to changing circumstances and to the knowledge acquired from experience in the use of the product."

Somewhat earlier, St. Paul noted that "The letter killeth, but the spirit giveth life."

Codification will not only stifle judges, it will revoke the authority of and exchew the precedents of the cases handed down from the birth of product liability to the day of the enactment. Instead, judges will find an array of novel terms and concepts, deliberately coined so as to be foreign to existing law. They will be handed the commentary of the Interagency Task Force on Product Liability and the hearings and reports from the Congress, and told to start instructing juries and deciding cases without straying from the letter of the code.

In addition, there are special dangers associated with codifying tort law. The tort equation is one of precarious balance. Those who would attempt through legislation to change or preserve it must approach cautiously with full recognition of what is at stake. It may well be that, given the political process and the absence of the power to push through an English-like "law revision" intact, the effort might better not be spent. American people are better assured of safer products, fewer shoddy goods and fewer shabby services by the judicial process than by the legislative process.

Finally, the dangers of codification to the broad interwoven nature of tort law must be acknowledged. Tort law is one of our oldest bodies of the declaration of rights and responsibilities. It reaches many aspects of the daily lives of natural and corporate persons. The law of product liability is but one scene in that panoramic tapestry. Professor James D. Ghiardi explains the consequences of creating new relationships in only that portion of tort law:

"The adoption of federal product legislation would also result in the application of a dual set of tort rules in the same action in many cases. An example is an automobile accident in which the plaintiff joins both the negligent driver and the manufacturer of the allegedly defective product. Different rules, such as the limitation period, the availability of punitive damages and contributory negligence would be applied in the same action. One defendant would be subject to the federal comparative negligence statute while the other defendant may have the benefit of a contributory negligence defense. The impracticability and inequity of such a situation is obvious."

There is no doubt in the minds of many defenders of the common law development of torts that the "reformers" will not rest until they have sought codification of the entire fabric. Product liability "tort reform" is not the first or the last run. Nevertheless, the "promise" of that grand scheme can hardly address the immediate problems which will result from the more politically feasible piecemeal strategy. Unnecessary, incomplete, ill-conceived, and rigid codification of tort law must be challenged in all its manifestations, be they grand or merely sweeping.

We turn now to the question of states' responsibilities, and to the new theory of government of a federal republic promoted in the bill.

One of the least honest aspects of the bill is the way in which it pretends to honor the clear wish of the American people to reduce federal involvement in our daily lives simply because it provides for no new federal bureaucracy.

The bill wipes out all state law on the subject it covers. It then imposes a new law, and boldly states that the new law must be enforced as state law. It cannot be enforced as federal law, the bill says.

The purpose of this is clearly to permit the proponents to go to the other branches of the federal government and so much as say, "Don't worry about it; it's got nothing to do with you—no new federal agencies; no new federal jobs; no new federal expenditures; no new federal court requirements."

When social thinkers cannot find precedent for new theories of law, they look for almost-precedent and try most creatively to stretch it into something that looks like it was always there, waiting to be recognized. There is something akin to that going on here. A new theory of government is being advanced, a new theory of the relationship between the central government and the components of our treasured federal system. It is a theory which, if adopted, will be available for every conceivable area of the governance of our people which, heretofore, has been jealously reserved to the several states, with not inappropriate paranoia. We are assured that the theory is not so very different from some similar schemes used in the past. The fact is, however, that it would permit the federal legislature to sit as a conglomerate state legislature, to average out the problems and non-problems of our wonderfully diverse bodies politic, and to send that solution-to-end-all-solutions back to the states for enforcement.

In 1980, the U.S. Advisory Commission on Intergovernmental relations devoted itself to a study of "The Future of Federalism in the 1980's." The Commission, composed of representatives from all levels of government, found strong evidence that as the federal role has grown "bigger, broader, and deeper" in its fiscal, programmatic, and regulatory dimensions, intergovernmental relations have become "more pervasive, more intrusive, more unmanageable, more ineffective, more costly and above all, more unaccountable." The summary findings, adopted by the Commission in March 1980, underscore the point:

"The Commission concludes that the current network of intergovernmental relations has become dangerously overloaded, to the point that American federalism's most trumpeted traditional traits—flexibility and workability—are critically endangered.

"The Commission further concludes that this threatening condition largely has come about as a consequence of a rapid expansion in the overall scope, range of specific concerns, and coercive character of the federal role in the federal system; because of the erosion of various political, judicial, and fiscal factors that formerly disciplined the national political process; and of the emergence and growing strength of interest groups—both public and private.

"The Commission obviously recognizes that while certain governmental activities necessitate an intergovernmental approach, it believes that the almost unbridled tendency on the part of the national government and the political process that sustains it to thrust nearly all of the nation's, most national domestic concerns, as well as an every multiplying number of parochial and even private concerns, into the intergovernmental arena reflects a feeble faith in the problem-solving capacity of the various partners in the federal system.

"The Commission believes further that this permits the national government to avoid some of its most basic domestic governmental responsibilities, while cluttering up its agenda with issues that more properly belong on that of a municipal or county council, a school board or a state legislature.

"Finally, the Commission concludes that neither equity (in the sense of giving due attention to jurisdictions or people in need), nor administrative effectiveness, nor economic efficiency, nor above all political, electoral, or administrative accountability are furthered by this tendency to intergovernmentalize practically all domestic questions, nearly all subnational governmental functions, and the bulk of the national government's own civil governmental obligations."

The 1980 elections demonstrated that the Commission's fears for the future of federalism were shared by the American people. However, the election of the Reagan Administration to restore the balance of responsibilities brought with it an interesting problem in this particular area of product liability law. What was an Administration to do when its natural constituency, whose philosophy had theretofore been "Defend my shores, deliver my mail, and stay the hell out of my business," pooled its affluence and influence for the purpose of being relieved of the consequences of its wrongful conduct by federal intervention? Incongruity is a large part of comedy, and this could be amusing but for the sobering purpose of the attempt, i.e. to shift the burden of loss from the manufacturers of defective products to the victims.

Predictably, pressure was brought to bear. The most that can be said today about the Administration's stance on this bill is that it does not oppose it, which is bad

enough. Claims that the Administration supports the bill are no more accurate than that lawyers support it, or that state legislators support it. The Administration still recognizes that federalism fosters social harmony, promotes civic responsibility and accountability, provides diversity, allows for local considerations, and does all of these things efficiently. Most important to this consideration, the Administration knows and has said that federalism helps secure individual rights by providing multiple avenues of redress of grievances. Preemptive federal product liability "tort reform" legislation flies in the teeth of that philosophy.

Proponents of preemptive federal product liability "tort reform" must assume that the federal government knows more about the subject than the state governments. They cannot tolerate the responsiveness and awareness of the state legal processes and insist that state law must be defined by someone and something other than the states.

Is Congress to say that it knows more about compensating the innocent victims of defective products than 50 state court systems? Does it know more than 50 state legislatures and 50 state governors?

The federal bills are without finding or factual predicate. Many states have gone to great lengths to collect and study the facts surrounding product liability and product liability insurance in their state. Some have even examined the situation at the national level in order to assess their relative position. The proponents show no interest in this important work. They would have the Congress blind itself to the collective wisdom which has come of it. They would have the Congress blind itself to the compassion and mores of the communities of each state, as reflected in the enactment of judicial rulings and jury findings of that community. They would impose on everyone the lowest common denominators of legal responsibility and safety.

It is not surprising that this cleverly devised raid on states' responsibilities, and therefore states' rights, is strongly opposed by those authorized by the people to determine state law, at least for now.

Since the last hearings by this Committee, the National Governors' Association has written in opposition to preemptive product liability legislation:

"The evidence presented to date does not justify the preemption of traditional state authority that would result from enactment of this bill. Many states have strong consumer protection laws already and others are examining their statutes in this area.

"The National Governors' Association believes that there must be highly compelling reasons to justify federal actions that require changes in policies adopted by state and local officials who are accountable to the same voters and whose performance is reviewed by them at least as often as the performance of Congress and the President. If preemption of state law is in the national interest, then the federal statute should accommodate state actions taken before its enactment. Provision should be made to permit states that have developed stricter standards to continue to enforce them and to permit states that have developed substantially similar standards to continue to adhere to them without change.

"We must continue to work together to bring balance into our federal system. Preempting state laws for the mere convenience of certain segments of society is not in our system's best interest."

Since the last hearings by this Committee, the National Conference of State Legislatures has written in opposition to preemptive product liability legislation:

"States have a primary interest in the health and safety of persons within their jurisdiction. In carrying out their responsibility to safeguard the public health and safety, the legislatures and courts of the states have developed over a century of experience in the product liability area. By contrast, the federal government has limited experience in this area. Reliance on the state legislative and judicial process provides a mechanism—a laboratory—for testing whether new product liability standards and procedures are fair and workable. A uniform federal standard, by its very nature, precludes this healthy process of experimentation. For these reasons, state product liability laws should not be preempted unless a substantial federal interest is at stake.

"In this case, it seems that the strongest justification for a national standard is the inconvenience of complying with 50 state laws. The mere inconvenience of complying with differing state laws, however, is not a sufficient reason for doing away (in effect) with those laws. Whether the issue is product liability, or certification for lawyers, or traffic rules, or criminal law, or hundreds of other matters which "affect" interstate commerce, the states must not be denied their historical role of protecting the public unless the need for a uniform national approach has been fully justified. In this case, no credible justification has been made."

Since the last hearings by this Committee, the Conference of Chief Justices has resolved in opposition to preemptive product liability legislation:

"Be it resolved, That the Conference of Chief Justices opposes enactment of broad federal legislation that would codify the tort laws of the 50 states as they relate to product liability, and opposes legislation, such as S. 2631 reported by the Senate Commerce, Science and Transportation Committee in the 97th Congress, that would attempt to do so."

These are the organizations of the people who are most keenly aware of how much the federal government has already arrogated to itself. The state leaders represented by these groups know how precariously they hold on to what has remained of our Founding Fathers' distrust of a strong central government. They recognize the broad threat of this bill, and the novel and dangerous theory of intergovernmental relations it portends. Whether in their executive offices, their legislative chambers, or their courtrooms, they are alarmed at the prospect of the federal government sitting as a conglomerate state legislature, passing state law instead of federal law. They share our view of the distorting nature of the "no new federal employees, no new federal caseload, no new federal expenditures" analysis.

If this bill is enacted, there will be no issue on which the amassed political power of those who cannot tolerate the responsiveness of the state law process cannot be brought to bear. There is nothing which truly distinguishes tort law from the other areas of the law which shall also be reserved to the states. We join those charged with the governance of the states in recognizing the sweep of the regime proposed, and in decrying any thought of legislating unwarranted and unwanted interventions.

It is appropriate to introduce an important word into this complex equation at this point.

The word is "safety."

Six years ago, almost to the day, Professor Thomas F. Lambert, Jr., then serving as ATLA's Editor-in-Chief, spoke of this Subcommittee about the deterrent value of the tort system. He related something a manufacturer's general counsel had said to him.

"Lambert, 20 years ago when we got a product liability claim, we laughed. Fifteen years ago, when we got a product liability claim, we smiled. Five years ago, when we got a product liability claim, it was a general exodus for aspirin. Today, when we get a product liability claim, we got back to the drawing boards."

Millions and millions of products are manufactured or sold every day. The American public is exposed every day in every way to an unbelievable number of objects as we work our way through our daily life. The vast majority of the products that we use, consume, sit in, ride, manufacture other products with and work with are safe. They are safe in manufacture and they are safe in design and they carry adequate warnings. They are safe and injuries are relative few because most manufacturers care. ATLA and I would be the first to acknowledge that and to be grateful for it.

These products are safe and the injuries are relatively few because most manufacturers dedicate themselves to the possession of substantial knowledge on product safety and risk avoidance. They possess, as do many insurers, an enlightened self-interest. It is in the manufacturer's best interest to be aware of the ultimate in risk management techniques and to apply those techniques. The vast majority of products are safe but some—you know it and I know it—are not.

The proper object of real tort reform is the elimination of wrongs, the elimination of unsafe products and hazards. It is not the elimination of rights, the rights of the victims of unsafe products, or their survivors, to be made as whole as is possible.

To a large extent, the common law of tort has developed around the proposition that legal responsibility imposed upon the manufacturers and sellers of defective products will eliminate wrongs. From product liability, it is said, we get product reliability. The cause of safety and reliability cannot be served by the legal escape hatches strewn throughout this bill for the use of uncaring manufacturers and insurers of defective products.

There are hundreds of examples in every day life in which a product was improved, a system better guarded, a warning more clearly and informatively stated, due to either the gavel of a product liability judgment, or the fear of one. Case after case has proven the nexus between legal responsibility and safety. It is appropriate and humane that the financial self-interest of the manufacturer, and his insurer, operate to limit the amount of harm to consumers.

What is dismayed, though, are the number of wrongs that have yet to be righted; especially those wrongs that have been repeated frequently. A new ATLA publication, being readied for distribution by the middle of next month, raises sobering

thoughts about the respective responsibilities that are shared by everyone concerned with the process of compensating victims of negligence and product defects.

The book is a two-volume work entitled *Products Liability: The First Twenty-Five Years*. It provides attorneys, scholars and other researchers with a wealth of information on the entire spectrum of product liability litigation during the last quarter century, whether they want to use it for legal research, as an aid to discovery, for academic inquiry, or to assist in risk analysis. It would also be useful, I hope, to public policy makers who are interested in how the law came to its present state, and why. It abstracts some 3,000 product liability cases from the pre-*Henningsen* days, when courts and lawyers wrestled with terms like "strict warrant," to the most recent ventures into bystander recovery and market share analysis. These are the real cases, with ample exposition of the facts and theories upon which they were based. These "horror stories" also carry full legal citations, unlike some others which have been entered into the record of this Committee but apparently nowhere else.

Because the book is indexed by product, jurisdiction, legal theory, plaintiff, and defendant, the principal patterns in this field became clear in a few minutes' time. I expect that many readers will have the same reaction I did, that is, chagrin to know that even the hard lessons of tort law are lost on the uncaring.

For instance, we all know that there has been much litigation involving birth control pills. It is disheartening, however, to note that more than 10 years have passed since the first cases were reported by ATLA and that pill-related injuries and deaths are still occurring.

The same holds true for other drugs. Aralen has been the subject of lawsuits for about 15 years now; Chloromycetin for 20; Quadrigen for 15. The product index of *The First Twenty-Five Years* reflects similar trends involving automobiles, football helmets, IUDs, and many kinds of industrial equipment. Why this ongoing mirror of tragedy must exist is not clear to me, on grounds of law, ethics, or pure economic self-interest.

Society has reacted to the problem of unsafe, defective products by requiring their manufacturers to treat the toll of injury and destruction as one of their costs of doing business. While many in the manufacturing community feel that this is harsh treatment, it reaches the problem at the only point where prevention of unnecessary future injuries is possible. It is based not on retribution, but, as Justice Benjamin Cardozo observed so long ago, simply on "the needs of life in a developing civilization."

In fact, this approach does nothing to brand the conduct of the manufacturer as immoral. Liability merely follows the demonstration of a defect and the establishment of a causal connection to some measurable harm. This is the most direct path to safety.

The law treats differently, however, the defendant who disregards the rights of society and the requirements of simple justice, and who, in so doing, magnifies an existing problem and multiplies the social costs which it inevitably creates. The examples of Thalidomide, the Ford Pinto, and the park-to-reverse transmission cases come immediately to mind.

Each Senator on this committee will receive a copy of *The First Twenty-Five Years* as soon as it is off the press. The cases speak better for the proposition that the rights of every citizen must be protected than all the rhetoric that could be mustered.

Rhetoric aside, what are the facts? Are facts offered? Are they addressed?

I am not the first to note that the bill contains neither a defined purpose nor any findings of fact. Those omissions may be appropriate since the bill cannot serve any proper purpose and cannot be justified by any known fact. It simply represents another unwarranted assault on the common law and the rights of injured victims.

It is difficult to address the absence of factual predicate for "tort reform" without repeating ourselves. Since September of 1976, ATLA has made a consistent and insistent record that there has been no need shown for this bill or any such bill. We have suggested those elementary facts which anyone should have in his possession before making any judgment. We have debunked the early overstatements and the early "horror stories" only to have new ones trotted out. Sometimes even the old ones are slipped back in as well.

The record is replete with summary statements of "crisis" (strangely enough, that word is still being used). Case law surrounding complex factual situations and careful balancing of interests are reduced to a few sentences and pawned off as "horror stories" with the purpose of depicting a carefully structured area of the law as a knee-jerk, pro-plaintiff collection agency deserving of ridicule and scorn. Significant data, painfully researched and rescued from the oblivion of insurance reports, have

been treated as unnecessary at best, or maybe even obfuscatory, and have been cut from the hearing record. Yet, the conclusory, unfounded statements to the contrary remain.

The latest shibboleth about the size of the "crisis" is: "100,000 product liability lawsuits are brought each year in state courts." The number is important because we know from the Insurance Services Office (ISO) Closed Claim Study that only 27 percent of product liability claims result in the filing of a lawsuit. This means that, adding the alleged 100,000 state court filings to the known 9,000 federal court filings, there would have to be over 400,000 product liability claims being made a year to result in those figures. The only thing complimentary that can be said of anyone who would have us believe that is that they have shown a 60 percent improvement from the days before the "million claims a year" outrage was debunked and reluctantly disowned.

What is known about the number of product liability suits filed in state court? Next to nothing. The National Center for State Courts (NCSC) is presently embarked on a monumental task to get the states to report caseload statistics in a uniform way. (It is worth nothing that they are making remarkable progress without the federal government telling them how to do it.) The NCSC project has begun to yield some useful figures. For example, the most recent extrapolation from their data suggests that there are approximately 600,000 tort cases (by whatever definition has been used in the states) filed in state courts, nationwide, each year. NCSC researchers say, however, that any guess as to how many of those cases were product-related is no more than a "stab in the dark." There simply is no data to support it.

What about the "explosion" in federal product liability filings? First, let it be noted that in the latest statistical year reported by the Administrative Office of the United States Court (AO), the number was down, not up. Can we draw any conclusions about state court filings from this decrease in federal filings? No more than when the federal filings were increasing, to wit, none. There is no known connection. Further, although the AO does not publish separate "case terminated" statistics on product cases, it does for "tort" cases. Over the years, it has been shown that 36 percent to 40 percent of tort cases in federal court are terminated with no court action whatsoever. Many of the remaining cases drop out along the pre-trial process. In the year ending June 30, 1982, only 12 percent of all federal tort cases resulted in a trial. Not all of those went to verdict; and the ISO reports that four out of five verdicts result in no payment to the plaintiff.

We have no reason to believe that claims have increased faster than at the incremental pace detected by ISO when it conducted its closed claim study. We do not know how many product liability claims there are in the state courts, and neither does anyone else. We do know what to think about those who, once again, are pretending to know something which they cannot. We wish they were more curious about the information which is available.

We testified in 1976 that there was no information that demonstrated anything other than an insurance problem. We repeated those charges until 1980 when we began to receive the "Product Liability Supplements," an additional filing appended to the annual statements and required by the National Association of Insurance Commissioners (NAIC).

While these figures may be typified by those who will not read them or cannot read them as "profit and loss information," they do provide volumes on the whole subject of risk sharing.

You can see from the following table that, among 150 of the top product liability underwriters in the nation, the highest Paid Loss Ratio occurred in the Lexington Insurance Company. They had \$10,359,616 in Earned Premiums, and \$13,293,926 in Losses Paid, for a Paid Loss Ratio of 1.28. The lowest ratio belongs to Holland American, which showed \$876,848 in Earned Premiums and nothing in Losses Paid, for a Paid Loss Ratio of 0. These 150 companies combined had \$1,293,168,305 in Earned Premiums for product liability coverage. They paid \$409,716,750 in losses. They, therefore, had a Paid Loss Ratio of .317 or put another way, for each dollar of premiums they paid 31.7¢ in claims.

* * * * *

A general look at the bulk of the premium dollars for product liability coverage shows that, for the last three years combined, the figures look like this:

Earned premiums	\$3,669,348,650
Losses paid	\$934,168,436
Paid loss ratio.....	.2545

or for each dollar of premiums the carriers paid 25 cents—two bits, a quarter of a dollar, in claims.

Enlightened self-interest should lead the manufacturers and wholesalers and distributors to other techniques for self-insurance, risk retention, risk sharing than the obviously inefficient methods offered them by the casualty insurance industry. This, coupled with a truly enlightened effort to achieve safe products, could solve the problems with no elimination of the rights of 220 million Americans.

Without defects there will be no cases; without harm there will be no cases; with no cases there should be no reason to continue this inhumane profit hunt at the expense of all victims.

Let us talk a little about the false but continuing canard about 77 cents for lawyers to 66 for victims. It is only in this fairy tale that the existence of victims is even alluded to by the bill's proponents. And in the use of this fiction the proponents would offer no change or reform, only the reduction of victim payment.

Let us find the source of this misinformation. I hope it is the result of sloppy work on the part of the President's Interagency Task Force. I would not like to believe that it was an intentional effort to deceive.

In 1976-77, the Insurance Services Office (ISO) undertook a closed claim study of product liability claims. It was this study that destroyed the old myth of one million, two million and three million claims a year. In the process of soliciting responses, they asked for an estimate of Allocated Loss Adjustment Expenses Incurred.

This was a request for an estimate of an estimate of an estimate. The results of the study showed that the respondents had estimated that 85 percent of Allocated Loss Adjustment Expenses Incurred went to defense lawyers.

By the time Mr. Victor Schwartz issued his report, this had become "In its closed claims study, ISO has estimated that about 85 percent of loss adjustment expense is expended for defense legal costs. . . ." Note the absence of "allocated" which appears on page 90 of the closed claims study. Note the absence of "incurred" which appears on page 546, on the survey questionnaire itself. I hope these omissions are the result of simple carelessness.

Allocated is only that portion of Loss Adjustment Expense which is identified with a specific claim. Unallocated is the entire expense of the insurance mechanism in place for the adjustment of claims which is not attributed to a specific claim.

Loss Adjustment Expenses Incurred is, by definition, Loss Adjustment Expense Paid plus the additions to reserves for Loss Adjustment Expense.

Thus a request for an estimate of an estimate of an estimate has risen to the status of a fact because of the willful carelessness of the broadcasters of the "77/66" slogan.

Since 1979, we have had facts, at least to the extent of Loss Adjustment Expense actually paid. A look at the following report shows that Aetna Casualty Group had Earned Premiums of \$102,703,614, and Paid Losses of \$69,275,661. Remember that the Earned Premiums are for 1981 occurrences but the Paid Losses are for all occurrence years which were paid in 1981. You will see that at part II they show \$31,955,916 Loss Adjustment Expense Paid or a figure equal to 46 percent of Losses Paid.

Note also Schedule P—Part 1. For 1981 occurrences, Aetna has paid \$1,614,023 in claims and \$183,197 in Allocated Loss Adjustment Expenses. For all years combined, they show a 37.5 percent ratio of Allocated Loss Adjustment Expense to Losses Paid. A total of 47.6 percent of Losses Paid went to Allocated and Unallocated Loss Adjustment Expense combined.

Now, to insure some statistical purity, we have determined the ratio of Loss Adjustment Expense actually paid (both allocated and unallocated) to losses actually paid. You will note the totals for 150 companies still, after three years of actually reported figures, remain at about 50 percent; 50.021543455, to be exact.

Thus you could arrive at 75 cents for lawyers to 66 cents for victims only if you can make yourself believe that there are none of the following expenses for defense (which are by definition Loss Adjustment Expenses): witness fees; court costs; salaries and expenses of investigators, adjusters, and fieldmen; rents; stationery; telegraph; telephone; postage; salaries and expense of office employees; home office expense; and all other payments under or on account of such injuries; and further, only if plaintiffs incur no expense such as the above, plus engineering research, expert witnesses, investigative costs, costs of depositions, et cetera. Such a proposi-

tion is ridiculous on its face, as is the figure spread by the unknowing, uncaring, or the intentional distorters of the truth.

The real defense cost figures are available only to the insurers, but they do not tell.

The fact remains that all legal expenses can be eliminated when the carriers have acquired a reputation for settling just claims justly. A goal eminently to be hoped for.

In summary, we repeat that the associations for the protection of danger makers must not be allowed to stifle common-law. They should not be allowed to create, for their own misguided and misbegotten reasons, a code country. They should not be allowed to strike this drastic blow at our concepts of a federation of sovereign states.

We have sought to demonstrate how inadequate is their need, how solvable is their problem, and how inappropriate it is to let their victims suffer even greater loss than they now do.

We hope that this extreme totalitarian proposal will not spread to attempts to insulate all the other wrongdoers of this society from the consequences of their wrongdoings as well.

Charles Dickens said, "If there were no bad people there would be no good lawyers." I will paraphrase—if there were no bad products there would be no product liability lawyers. I pray for that day.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Approximately how many product-related injuries occur each year? How many claims are filed annually regarding product-related injuries? How many product liability lawsuits are filed each year? What percentage of these cases result in recovery by an injured plaintiff?

Answer. It is both unfortunate and telling that you find it necessary to pose this series of questions at this late date. The very foundation of the proponents' position should be based upon the kinds of information which you have never obtained and which you are now asking us to supply. It is impossible to understand how the proponents can perceive a major, or even a minor, problem with the tort system if they have yet to obtain and conscientiously examine this kind of data.

Although we have sought to obtain the information from the people who control it, the insurance industry, we have been unsuccessful in our efforts. Even though we do not possess the data which is necessary to answer these questions, there are a few points that are worth making.

With regard to the first part of your question, the answer is that no one knows. However, Kenneth Rashid, Associate Executive Director for Communications at the U.S. Consumer Product Safety Commission, said "some 33,000,000 people are injured every year while using products found in their homes, in schools and in recreational areas . . ." Statement of Kenneth Rashid, Associate Executive Director for Communications, Consumer Product Safety Commission before the Consumer Subcommittee of the Senate Commerce, Science, and Transportation committee on Consumerism in the 1980's. House Serial No. 97-56, page 38.

With regard to the second part of your question, we reiterate what Tom Bendorf said in testimony on March 12, 1982: "The number of claims filed in the states can be provided by the insurance industry. The level of claims paid in the states can be provided by the insurance industry. It is impossible for me to provide information on the subject of claims. But it is equally apparent that they have not and will not—so you can ask me to provide the information, and I will do my best. I hope that you will ask them to provide the information as well, because they have it." Statement of C. Thomas Bendorf on behalf of ATLA before the Senate Consumer subcommittee of the Senate Commerce, Science, and Transportation committee; on Product Liability Reform. Serial No. 97-109, pages 98-99.

With regard to the issue of claims, Mr. Bendorf further testified on March 12, 1982, that: "We have learned that the million claims a year are more like 70,000." At page 88. He added in subsequent colloquy: "Two surveys with which I am familiar have indicated claims have decreased—that made by the joint committee on tort liability in California studying the entirety of the tort world, and that made by Carnegie-Mellon University in Pittsburgh for the Western Pennsylvania area. Evidence to the contrary is educed by the increase in Federal filings." Statement of C. Thomas Bendorf on behalf of ATLA before the Senate Consumer subcommittee of

the Senate Commerce, Science, and Transportation committee; on Product Liability Reform. Serial No. 97-109, page 97.

The third question in the series—that which asks the number of product liability suits filed annually—is a question that ATLA asked the National Center for State Courts earlier this year. The Center responded that with almost no exceptions, states do not keep an account of the number of such suits filed, so of course, the National Center has no such data. It's their impression that most estimates they've heard regarding this figure are "way off base" as too high.

Finally, the only real data regarding the percentage of cases resulting in recovery comes from a 1977 Products Liability Closed Claims Survey of the Insurance Services Office. To quote that survey: "... the percentage of claims which receive payment tends to increase as the stage of the legal system becomes more advanced, except that the percentage decreases to its lowest value for those claims which go all the way to a court verdict. These tables indicate that the insurers usually settle out of court and only defend to a court verdict when they have a very high probability of winning." Table 15-3, which accompanied the text, showed that when suits were filed, but settlement was reached before trial in cases involving bodily injury, 80.9 percent of the cases were closed with a payment. When suits were filed but settlement was reached before a court verdict, 83.3 percent of the cases were closed with a payment. With those suits which went to a verdict, 21.4 percent of the cases were closed with a payment.

Question. Mr. Bendorf of ATLA testified last year on S. 2631, the predecessor to S. 44. He said ATLA "will support any proposal which will reduce the necessity of going to court." Hearings on S. 2631 at 99. Does ATLA still take that position?

Answer. Mr. Bendorf's statement is quoted out of context. In fact he stated, "we will support any proposal which will reduce the necessity of going to court, but we will oppose anywhere any proposal which denies the right to go to court." Statement of C. Thomas Bendorf on behalf of ATLA before the Senate Consumer subcommittee of the Senate Commerce, Science, and Transportation committee; on Product Liability Reform. Serial No. 97-109, page 99. It was clear then, as it is now, that ATLA views the production of safe products as the best deterrent to injuries and the settlement of just claims justly as the best deterrent to litigation. The elimination of rights will never be an acceptable way to reduce litigation in this country. At no time has ATLA supported any federal proposal that would impact on this question. ATLA still supports this principle of preservation of rights.

Question. Mr. Bendorf also stated that ATLA would support legislation equivalent to section 9 of S. 44 which makes a product seller liable for product-related harms only where the seller himself has acted wrongfully or where the responsible manufacturer cannot be served with process or is judgment-proof. Hearings on S. 2631 at 198. Does ATLA still take this position?

Answer. This question drastically mischaracterizes Mr. Bendorf's prior testimony. It is obvious that neither he nor ATLA ever desired or supported any federal legislation in this area. At that prior hearing Mr. Bendorf did state, "Incidentally, we do in part agree with wholesalers, distributors and retailers that it is rare that they should be joined as defendants in product liability suits. We will be happy to work with them in the development of state legislation which would ensure their exclusion except when that exclusion would do violence to the interest of justice. We would also assist them to the extent of our ability in the passage of such legislation."

ATLA was willing to work with national associations of wholesalers, distributors and retailers to determine whether acceptable state legislation might be properly developed. In the fifteen months which have elapsed since ATLA publicly extended that offer, which was never intended to be perpetual, not one such association has accepted it by suggesting any desire to work together. If and when any such association expresses interest, ATLA will respond appropriately. Until that time, ATLA has no position with respect to any such legislation in any particular state.

Question. Do you believe that where there is an innocent manufacturer and an innocent plaintiff the manufacturer should pay for harms caused by a product? If so, why? Do you think the innocent manufacturer should pay even if the plaintiff has received compensation for the product-related injury from another source, e.g., from insurance or workers' compensation? Would your answer be the same if the innocent manufacturer is a small business that would go bankrupt if forced to pay?

Answer. We recognize four questions which we will refer to as (a), (b), (c) and (d).

(a) This question reveals a basic misconception of civil law. Innocence and guilt are not issues. The issue is whether harm has been caused by a defective product.

(b) We continue to support the principles of Restatement (2d) of Torts, Section 402A, as interpreted by the courts which have placed liability upon the manufacturers of defective products.

(c) The manufacturer of a defective product should not be the beneficiary of an injured victim's, or someone else's, prudence in having paid insurance premiums. To make the manufacturer the beneficiary of the victim's insurance policy would be patently unjust. To adopt this protectionist attitude toward manufacturers of defective products as a social policy would chill any incentive toward a safer society through safer products. An injured claimant's ability to receive compensation from a manufacturer despite payments from another source is not peculiar to products liability. The collateral-source rule is followed in federal courts and all states (except Alabama) and is applied in all tort cases, from automobile accidents to malpractice. The rule is firmly based on the proposition that where a person has purchased or bargained for insurance coverage and is injured, the insurance proceeds should go to the insured and not be credited to the tortfeasor. There is no reason to abrogate this well-settled rule of law by carving out a special exception for product suppliers.

(d) Any rare situation discovered and provided by the proponents to the contrary notwithstanding, the risk of bankruptcy due to a large liability judgment is a problem only for those businesses that have not obtained liability insurance and for those who may have no proper place in the marketplace under any circumstances. The Interagency Task Force [determined*] that product liability insurance is generally available and affordable for manufacturers. Congress has enacted the Risk Retention Act to enable businesses to form their own risk retention groups. If small businesses need further assistance in obtaining insurance protection for their activities, the problem should be addressed directly. It should not be used as an excuse for depriving injured people of just compensation for their injuries.

Question. Do you believe that a claimant should recover for product-related harms due to misuse of a product by the claimant or by a third party?

Answer. ATLA's position has not changed since it was presented to the Committee on Small Business in the United States House of Representatives on December 29, 1977. We still believe the principles of Restatement (2d) of Torts, Section 402A, as interpreted by the courts, provides the proper legal framework to relieve manufacturers from liability in those cases where it is determined that improper conduct of the product user rather than the defective condition of the product caused the injury. We continue to agree with the legal principles that manufacturers must be held responsible for harm caused by defective products when those products are used under conditions which are known or are foreseeable. It would be unthinkable and irresponsible to absolve manufacturers from liability for the manufacture of a defective product under such circumstances.

Question. Can you give example of instances in which a product caused a harm not attributable to misuse, alteration, or modification of the product and liability should not be imposed on the manufacturer of the product? If so, can you specify a fair, clear test for separating those instances from cases in which liability should be imposed on the manufacturer?

Answer. This question is difficult to interpret. It speaks of possible circumstances under which liability should not be imposed when harm is not attributable to misuse, alteration or modification. At the same time, it says nothing about the presence or absence of any product defect. The question appears to ask whether there are examples of instances in which liability should not be imposed for harm caused by products. The answer, of course, is yes. No useful purpose would be served by enumerating countless examples of persons being harmed while using non-defective products. As we have pointed out before, the fair, clear test for separating out those cases in which liability should be imposed on the manufacturer is set forth in the Restatement (2d) of Torts, Section 402A, as interpreted by the courts.

Question. Would you support a bill that imposes liability for all harms caused by products?

Answer. ATLA's policy positions are formulated by its Board of Governors. Although the Board of Governors does not adopt positions with respect to theoretical bills that have not been introduced, I foresee no circumstances under which it would support such a bill. The Board of Governors has made it clear, however, that ATLA will not support any federal preemptive product liability legislation.

Question. Would you support a bill that imposes liability for all harms caused by products with damage limitations similar to those in compensation statutes?

Answer. ATLA's policy positions are formulated by its Board of Governors. Although the Board of Governors does not adopt positions with respect to theoretical bills that have not been introduced, I foresee no circumstances under which it would

support such a bill. The Board of Governors has made it clear, however, that ATLA will not support any federal preemptive product liability legislation. ATLA has also made it clear that it opposes legislation which limits recovery to anything less than that which is required to make a victim whole.

Question. What percentage of plaintiffs in product liability actions have some form of health and/or medical insurance? Where a plaintiff does have such insurance, what percentage of the plaintiff's damage in a product-related case, is covered by the insurance?

Answer. The exact percentage of plaintiffs with some form of health or medical insurance is unknown. Best available estimates are that approximately 93 percent of Americans have some type of health or hospital coverage. Certainly there is no reason to believe that any different pattern exists among plaintiffs in product liability actions.

Because these are insurance programs for which the victim has already paid, he is entitled to receive all of the benefits even if he receives damages from a tortfeasor defendant who is held responsible for the injury. Fairness dictates no less. Any other result would mean that the victim is paying to insure the tortfeasor.

Without regard to the question of what percentage of plaintiffs are insured, we reaffirm our position that this type of information is not relevant for the same reasons as explained in a prior question on the application of the collateral-source rule.

Question. What is the average contingent fee arrangement in product liability cases? What is the average dollar amount, other than costs, received by plaintiff's attorneys in product liability cases which are settled and in those which are litigated?

Answer. There is no information available and I have no idea what the average contingent fee arrangement in product liability cases is, nor do I know who, if anyone, would have that information. Similarly, I am unaware of any such information concerning average dollar amounts, with or without costs, received by plaintiffs' attorneys in product liability cases. The only available reports are those related to automobile injury reports which have been prepared by the insurance industry. Those estimate that all lawyers receive 27 percent of the total claims paid by the insurance industry. U.S. Department of Transportation, Automobile Insurance and Compensation Study, 1970-1971. AIRAC Closed Claims Study of 1977.

Question. It is alleged that plaintiffs often pay exorbitant percentages of their recoveries to the lawyers. Would ATLA support enactment of contingent fee statutes that specify a sliding scale for product liability cases? If not, why not? If so, describe the type of sliding scale ATLA supports.

Answer. I believe that those making this allegation are misstating reality. The allegation did not originate with the thousands of injured persons who have been able to pursue their claims by retaining lawyers on contingent fee bases. The complaints seem to come from those who have paid the claims rather than those who have paid the fees.

ATLA opposes fee regulation beyond the scope of present local provisions which adequately provide the client access to court, supervision and review of unreasonable fees and disciplinary sanctions against an attorney who would charge an exorbitant fee or bring a baseless lawsuit.

Question. Is it true that some attorneys refuse to handle a plaintiff's product liability action unless the damages are over a certain amount? What is that amount?

Answer. While it is obviously true that attorneys refuse to handle some cases under any circumstances, I have never heard any specific amount of damages suggested as a criterion. There is no data available to suggest why attorneys refuse to handle certain cases. There are numerous factors which are considered in determining whether and under what terms to undertake an individual's representation in any kind of case. Among these factors are the merits of the claim or the likelihood of success, the availability of witnesses and evidence, the nature and extent of the injury, the anticipated or likely costs and time to be expended, the lawyer's own schedule and workload, etc. No magic formula exists for quantifying these various factors in the abstract. Although there should be some reasonable relationship between the anticipated recovery and the anticipated expenditure of time, energy and resources, of necessity that relationship will vary from case to case.

Question. Can you name instances where the common law was replaced by a statute and, as a result, the law was more confused?

Answer. We do not understand this question. Are you suggesting that the common law is ipso facto confusing and that statutes generally are not? Are you suggesting that the law of product liability is confusing and that S. 44 is not? Are you suggesting that the body of decisional law which has developed under Restatement (2d) of Torts, Section 402A, as interpreted by the courts, is confusing and that

the body of decisional law which has not even been considered under S. 44 will not be?

In any event, we envision no system under which the wholesale replacement of the common law of product liability by a federal statute, to be interpreted and developed by thousands of jurists in more than fifty jurisdictions, could be anything but confusing and cast in concrete. This confusion could be later clarified in piecemeal fashion only by the federal legislature on whatever schedule the appropriate work of that body leaves for correcting mischief.

Question. Does ATLA support enactment of a Federal statute defining and clarifying the liability of manufacturers for harms related to environmental pollution?

Answer. No.

Question. Tort law holds architects, engineers, lawyers, doctors, and virtually all other to a standard of reasonableness. Harms caused by their failure to make decisions or judgments in a reasonably prudent manner will subject them to liability. How do you justify holding manufacturers to a different standard, a standard of strict liability for harms caused by decisions or judgments they make regarding a product?

Answer. As in indicated in my statement to your Committee on April 27, 1983, the body of the common law as we know it is a cool pure stream of progressive humane development of expanded recognition of the societal validation of human rights. This stream is nourished by legislatures responsible and responsive, by courts and juries, and by the vitality of our system of common law. Our primary tools, under the common law, are the precedent of similar cases. Some of those decisions draw their strength from the pure authority of judicial hierarchy; others from the sheer force of merit and persuasion. The result is a vibrant and vital body of laws carefully balancing the conflicting needs of the day as reflected in that day's disputes.

Tort law as it has evolved over the centuries may apply different standards and levels of responsibility according to the dictates of current societal needs and the judicial perception of public policy. Not all types of tortfeasors are treated the same under our system of justice; nor should there be a universal standard of responsibility.

We have pointed out, endlessly it seems, the principles underlying the public policy requiring the application of strict liability in tort against suppliers of defective products. We have never been asked to formulate and express an institutional position as to whether strict liability should apply to providers of professional services and we are not prepared to do so today. However, it is clear to me that ATLA would instantly reject any contention that the common law and public policy demand that, where part of our society may be held to a certain level of responsibility and liability, all other members of society must of necessity be held to that same level. We would reject this common denominator approach to complex questions of liability, involving the balancing of societal needs.

Society has reacted properly to the problem of unsafe, defective products by requiring that manufacturers treat the toll of injury and destruction as one of their costs of doing business. Strict liability is the theory of liability that best accomplishes our society's goal. We would suggest that this question properly stated is "Can the manufacturers of defective products justify avoidance of liability because other in our society may be held to another legal test?" We think not.

Question. You testified that strict liability is not absolute liability, because it requires proof that a defect in the product caused the claimants harm. If a product causes a harm, is it defective? If not what is the standard for determining whether there is a defect in the product?

Answer. The subject of this proposed legislation is liability. Liability occurs where there is a defective product and where there is harm and where there is a casual relationship between the defect and the harm.

Harm alone does not produce liability. Defect alone does not produce liability. Harm and defect without casual connection do not produce liability.

The standards for determining whether there is a defect are found in Restatement (2d) of Torts, Section 402A as interpreted by the courts.

Question. S. 44 proposes a negligence, fault-based standard for design and warning cases. That standard is based on what is reasonable at the relevant point in time. Do you believe that standard, as applied by courts and juries, will be rigid?

Answer. Yes. As it should be clear, ATLA refuses to support any aspects of a federal bill which preempts and codifies all state law of products liability. As I indicated in my written statement to your Committee on April 27, 1983, our position against codification of the common law is based upon many factors, including our strong belief that one of the most ominous dangers of codification is the danger of

rigidity. The rigidity of codification seems both from how difficult it would be to amend the law and from how it would reduce our adjudicating bodies to automations, collecting facts through the slots at the top, running them through the code's mechanical analysis, and dispensing justice below.

Codification will not only stifle judges, it will revoke the authority of the eschew the precedents of the cases handed down from the birth of product liability to the day of the enactment. Instead, judges will find an array of novel terms and concepts, deliberately coined so as to be foreign to existing law. They will be handed the commentary of the Interagency Task Force on Product Liability and the hearings and reports from the Congress, and told to start instructing juries and deciding cases without straying from the letter of the code.

We reiterate Professor Wade's admonition that:

"Legislation can have the effect of stultifying the continuing development of the law, and preventing the courts from adopting to changing circumstances and to the knowledge acquired from experience in the use of the product."

Question. Can you cite examples "in which a product was improved, a system better guarded, a warning more clearly and informatively stated, due to either the gavel of a product liability judgment, or the fear of one" and in which the same action would not have been taken under S. 44?

Answer. We can cite that which has occurred in the past. We can only predict that which will occur in the future. Litigation, and the fear of litigation, has proven to be an effective method of improving products, improving warnings and above all else improving safety. The goal of S. 44 is to reduce litigation, reduce responsibility and reduce safety. We find it impossible to believe that the amount of money, time and effort being spent by the proponents of S. 44, most of whom manufacture or sell defective products, is spent without the expectation of a reduction in the pressure which has resulted in safer products. We can cite their efforts to avoid responsibility but can only predict the effect on product safety.

Question. S. 44 specifies a standard of strict liability of harms caused by products that are unreasonably dangerous in construction? Do you agree in the principle that this standard should apply in construction defect cases?

Answer. As a matter of principle, we would oppose any federal bill preempting and codifying the law of state product liability. We reiterate our support of Restatement (2d) of Torts, Section 402A as interpreted by the courts.

Question. S. 44 specifies a standard of strict liability for harms caused by products that are unreasonably dangerous due to breach of an express warranty. Do you agree in principle that this standard should apply in express warranty cases?

Answer. As a matter of principle, we would oppose any federal bill preempting or codifying the law of state product liability. We support the theory of strict liability for express representations as found under Restatement (2nd) of Torts, Section 402B as interpreted by the courts.

Question. Your testimony states that "significant data, painfully researched and rescued from the oblivion of insurance reports, have been treated as unnecessary." Provide that data and explain its relevance to efforts to enact in product liability statute.

Answer. As an appendix to this series of answers some data provide with prior testimony is repeated.

The information shows the amount of premium income for product liability insurance paid by manufacturers and sellers, the amount of claims paid by the insurers, the cost of settling claims and the amounts reserved for future payment of claims.

The figures show that there is no meaningful financial burden on the insurance purchasers or upon the public. They belie the claims made by the proponents concerning loss adjustment expense and they demonstrate the folly and even injustice of seeking to reduce the pittance for injured victims even further while apparently not reducing insurance costs at all.

We will continue to research these figures. We will continue to provide these figures to anyone who needs them. We continue to hope that the relevance will someday receive the same perception that irrelevance and hyperbole have so far received.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. Is there any benefit from S. 44 to consumers generally which lends balance to this approach?

Answer. The very source from which support for this bill flows belies the possibility of any general consumers' benefits which could be described as a balanced ap-

proach to product liability. The forces who advocate the bill are not dedicated to the protection of consumers, but rather to the protection of the economic interests of those whose products harm the public. Just as the bill's supporters recognize the imbalance, so also do the consumers of America. Organized labor and organized consumers of this country know the dangers of stepping back from the development of the common law of product liability. If they were the beneficiaries of the bill they would stand together in support. Instead, they stand together in opposition.

Question. Is there any other statute which preempts State tort law, but which does not create either concurrent Federal and State jurisdiction or a Federal administrative mechanism?

Answer. I am aware of no such statute. The question might produce an interesting academic project except for the enormity of the consequence of a federal law which purports to supersede all state law but which provides no system for federal enforcement. We are terribly frightened by the prospect of the destruction of our concept of federalism.

The bill wipes out all state law on the subject it covers. It then imposes a new law, and boldly states that the new law must be enforced as state law. It cannot be enforced as federal law, the bill says.

The purpose of this is clearly to permit the proponents to go to the other branches of the federal government and so much as say, "Don't worry about it; it's got nothing to do with you—no new federal agencies; no new federal jobs; no new federal expenditures; no new federal court requirements."

When social thinkers cannot find precedent for new theories of law, they look for almost-precedent and try most creatively to stretch it into something that looks like it was always there, waiting to be recognized. There is something akin to that going on here. A new theory of government is being advanced, a new theory of the relationship between the central government and the components of our treasured federal system. It is a theory which, if adopted, will be available for every conceivable area of the governance of our people which, heretofore, has been jealously reserved to the several states, with not inappropriate paranoia. We are assured that the theory is not so very different from some similar schemes used in the past. The fact is, however, that it would permit the federal legislature to sit as a conglomerate state legislature, to average out the problems and non-problems of our wonderfully diverse bodies politic, and to send that solution-to-end-all-solutions back to the states for enforcement.

Question. How does an increase in the standard of proof from strict liability to negligence create incentives for improved product safety?

Answer. There is a mismatch in the law and the rules that exist today.

We do not feel that the public is adequately aware of the true mismatch which faces any luckless victim who seeks to exercise his rights under current law.

He, the plaintiff, believes he has been injured as a result of a defective product. He must find a lawyer. If it is a simple case, he needs no lawyer. If it is a complex case, he needs resources. They must be his resources or those of his lawyer. He must hire experts. Delay can be fatal to his cause and he must always carry with him a burden of proof.

Whom does he face? The resources of the manufacturers, distributors, retailers and the insurance carriers. Witnesses? The collective resources again, plus the trade associations and the collective information of the insurance industry. They have the "know how," they have the money, and they profit from delay. And the plaintiff still has the burden of proof.

A change in the standard of responsibility from strict liability to negligence and the resultant increase in the burden of proof can only make this mismatch more onerous and can only lead to reductions to the incentive for product safety.

Question. Although strict liability is the law in two-thirds of the States, proponents of S. 44 contend that the courts actually apply a negligence standard in most design defect cases. Thus, they contend that enactment of the negligence standard for design defects as in S. 44 would not affect the law in the majority of states. First, do you believe this to be a correct analysis of the law?

Second, would codification of a negligence standard in design defect and failure to warn cases abrogate the rights of the plaintiff currently enjoyed in the law of two-thirds of the states?

Answer. I do not believe the proponent's analysis to be correct. I am not even sure that they are serious in their contention. It is inconceivable that the proponents would be urging this unprecedented legislation if they did not expect it to have the very effect which this analysis disavows. The manufacturers of defective products want relief and they cannot get it without undermining the law of strict liability in the majority of the States.

Question. Proponents have also stated that there may be "some slim margin of difference" between automatic worker compensation payments and strict liability as it is applied in some states. Using New Jersey law as an example, is this true?

Is the trend of state law towards a no-fault or compensation system where no product defect need be proved?

Should we adopt such a compensation system where individual responsibility need not be proved?

Answer. We can not believe that the proponents of S. 44 can seriously assert that there is little difference between the system of workers' compensation and our tort system of product liability. The complexities defining the differences between the two systems may be readily found in the leading treatise on workers' compensation. 1 Larson, Workmen's Compensation Law, Section 2.00 (Matthew Bender, 1982). We can not agree with any analysis that equates these two different systems, nor do we believe that any one can honestly contend that the application of state product law, whether in New Jersey or in any other state, can be characterized as almost equivalent to workers' compensation.

With reference to the last two parts of your questions, our answers would be emphatically "no" to both.

Question. It has been said that the product liability tort litigation system costs more in litigation and transaction costs than the average net recovery received by the claimant. Would you comment?

Answer. It has never been said truthfully that the product liability tort litigation system costs more in litigation and transaction costs than the average net recovery received by the claimant. The source for this canard was based on a question by the Insurance Services Office to the participants in their 1977 Closed Claims Survey. The results of question concluded that the insurance companies estimated that 85 percent of allocated loss adjustment expenses incurred went to defendant legal fees. Loss adjustment expenses, both allocated and unallocated paid, have never exceeded 50 percent of claims paid by the insurance companies. See 1979, 1980 and 1981 Products Liability Supplements. Only by ignoring the facts and by relying on misquoted, misstated insurance company estimates in 1977 can that above statement be made. Stephen Leacock said "a half-truth is like a half-brick—you can throw it twice as far". The mileage achieved by the purveyors of the above statement has been phenomenal.

Question. Would you briefly summarize the significance of all the insurance figures you have given us in your statement?

Answer. The significance of the figures demonstrates that the outer range of the so-called problem could amount to about \$2.00 each year for every man, woman and child in the United States of America as this their per capita share of the claims paid as reported by the insurance companies. They further indicate that in 1977, 1980 and 1981 the insurance industry paid in claims \$1.00 for each \$4.00 in earned premiums. They further indicate that the total of those earned premiums is a very minute portion of the total cost of the products manufactured in the United States. When you realize that those premiums are paid not only by manufacturers, but also by the wholesalers, distributors and retailers, the real impact on America's industrial might becomes minimal indeed. All citizens of the United States are now able to afford a system of justice, some protection, and the realization that wrongdoers will be financially responsible for the wrongs they do. It seems a small price to pay. The insurance figures demonstrate how small the price is.

Senator KASTEN. Thank you, Mr. Specter. With testimony like that, we ought to have you back every couple of weeks.

Mr. SPECTER. I am available and at your disposal, Mr. Chairman.

Senator KASTEN. Mr. Dirk Van Dongen, representing the National Association of Wholesaler-Distributors, accompanied by Mr. Louis Marchese and Mr. Victor Schwartz. Mr. Van Dongen.

Mr. VAN DONGEN. Thank you, Mr. Chairman.

I am Dirk Van Dongen. I am here today to express the very strong support of the 45,000 members of NAW for the enactment of S. 44. Unlike Mr. Specter and many of the witnesses who will appear today, I am not a lawyer. I bring a different perspective, therefore, to these hearings.

The views I express here today are those of small businesses across the Nation. To these small businessmen, the current product

liability tort system is simply unpredictable and unfair. Indeed, it flaunts commonsense and it flaunts equity, in their estimation.

Passage of S. 44 is urgently needed, and we commend you, Mr. Chairman, for your courage, for your determination to address this very real problem with a fair and a balanced bill.

As you have indicated, accompanying me today are Mr. Louis Marchese, associate general counsel to NAW, and Professor Victor Schwartz, legal counsel to the Product Liability Alliance.

NAW serves as TPLA's executive secretariat, but my testimony today is on behalf of NAW alone. I have asked Professor Schwartz to join me because of his close familiarity with the evolution in our thinking from a focus on State-oriented approaches to the conclusion that interstate commerce realities mandate a Federal solution to the product liability problem.

Mr. Marchese also brings a special perspective to this hearing. Beginning in the mid-1970's, he counseled product liability reform task forces which we established in over 30 States to work for passage of reform legislation.

I hope that in your questioning you will allow him to share with you his experiences in the State reform efforts.

Mr. Chairman, I wish to make five brief points. I ask that my first statement be included in the record.

Senator KASTEN. It will be.

Mr. VAN DONGEN. Point No. 1, to be effective, reform of the product liability tort system must take place at the Federal level, not the State level. The flow of products from manufacturer to wholesaler-distributor to retailer or business user, and finally to the consumer, transcends State borders.

The unpredictability of a State-by-State-by-State, case-based system simply makes it a practical impossibility to anticipate one's legal responsibilities in the area of product liability.

No. 2, S. 44 is the result of a careful, a reasoned, developmental process. It has been molded, shaped, and reshaped in a manner which has been open, which has been public, which has been fair. You, Mr. Chairman, and the members of this committee involved are to be commended. It is now time in our estimation for S. 44 to move through the Senate.

No. 3, section 8 is of special import, of course, to wholesaler-distributors and product sellers. It has received, however, broad support from manufacturers and others as well. The purpose of section 8 is to eliminate unnecessary legal costs without adversely affecting any party. It, thus, benefits all affected by the product liability system, not just product sellers.

Section 8 will reduce unnecessary legal costs while maintaining appropriately the liability of wholesaler-distributors and other product sellers in those situations where they are negligent, where they are in breach of their own warranty, or the manufacturer of the product cannot be reached.

In all candor, Mr. Chairman, we believe that this last provision does clash with the fault-based thrust of section 8, but, we recognize that its inclusion in the bill results from your interest in insuring that means of redress exist for those that are injured by a product that was in fact defective, and therefore we accede to your judgment as regards inclusion of this provision in section 8.

My fourth point is that the need for product liability tort reform has not been diminished by passage of the Risk Retention Act. This act deals effectively and it deals completely with the insurance dimension of the product liability problem by providing wholesaler-distributors and others an alternate mechanism for covering their product liability insurance needs if the commercial underwriting system fails to do so.

We are one of the first to move to utilize the Risk Retention Act to meet our members' insurance needs, and in establishing our program, we have come to appreciate fully the difficulties commercial insurers face in setting rates for product liability coverage, because of the underlying tort system with its uncertainty, its unpredictability, and its lack of uniformity.

Insurance ratemaking practices are not the issue. The issue is the underlying legal system.

Mr. Chairman, my final point has to do with the positions taken by the legal profession on this issue. Some of the representatives of the legal profession have told this committee that product liability reform, if it is needed at all, should be pursued at the State level, but let me focus your attention on what it is that the bar associations who oppose such legislation at the Federal level are in fact saying in the State legislatures.

Let me give you, indeed, a most recent example. On September 8 last year, an Ohio State legislative committee held a hearing on a bill containing a seller's provision. Russell Smith appeared on behalf of the Ohio Academy of Trial Lawyers in opposition.

Senator Kenneth Cox, in questioning Mr. Smith, referred to the testimony of Mr. Thomas Bendorf before this subcommittee, representing ATLA, 2 months before the Ohio hearing, in which he expressed ATLA's general agreement with the logic of a seller's provision and suggested the willingness of the trial bar to work with us at the State level in furtherance of such legislation.

Senator KASTEN. Mr. Van Dongen, I would ask that you summarize the remainder of your statement.

Mr. VAN DONGEN. Yes; I was just about to finish.

Senator Cox stated, and I quote, "Evidently, the Ohio bar and the Ohio Academy take issue then with the Association of Trial Lawyers of America."

Mr. Smith's pointed reply was, "Senator Cox, Mr. Bendorf, No. 1, does not speak for the Ohio Academy of Trial Lawyers."

My point is, Senator, with all due respect to Mr. Bendorf, whose professionalism I highly respect, the bar associations at the State level are opposing product liability reform legislation as strongly as they are opposing it in this forum.

Thank you, Senator. I would be glad to answer your questions. [The statement follows:]

**STATEMENT OF DIRK VAN DONGEN, PRESIDENT, NATIONAL ASSOCIATION OF
WHOLESALEERS-DISTRIBUTORS**

I am Dirk Van Dongen, President of the National Association of Wholesaler-Distributors (NAW). This Association supports the enactment of a Federal product liability statute. Specifically, NAW supports enactment of S. 44. That bill is the result of seven years of effort and study by three Administrations and Congresses of the problems of product liability. I particularly commend the work of this Subcommittee which has developed a fair and balanced bill.

Accompanying me today are Mr. Louis Marchese, Legal Counsel to NAW and Mr. Victor Schwartz, Counsel to The Product Liability Alliance. Mr. Marchese has worked closely with NAW in its attempts to address the product liability problem at the state level, and has special expertise on state statutory product liability developments. Mr. Schwartz is here because he has a special background in the area of tort law as a well-recognized author in the field, and as Chairman of the Federal Inter-agency Task Force on Product Liability under both the Ford and Carter Administrations.

NAW serves as Executive Secretariat of The Product Liability Alliance, but my testimony today is solely on behalf of my Association.

NAW is a federation of over 120 national wholesaler-distributor trade associations (see attached list), with a collective membership of 45,000 firms operating at approximately 150,000 locations throughout the nation. NAW's members represent a constituency at the core of our economy—the link in the marketing chain between manufacturers and all product users. Wholesaler-distributors are generally small- to medium-sized closely-held, family-owned businesses providing stable, well-paying jobs to over five million Americans.

While the vast majority of industry firms are smaller businesses, in 1982, according to the Department of Commerce, they were responsible for over \$1,163,400,000,000 in economic activity. Our members distribute and wholesale every conceivable consumer and industrial product, from surgical tools to heavy construction equipment.

This large and relatively diverse group of wholesaler-distributors is in agreement that the issue of product liability must be addressed at the Federal level. The problems associated with the current product liability tort litigation system are serious. That system is based primarily on case law developed by individual state courts. The resulting rules of law applied in product-related cases are uncertain. They are subject to change from one case to the next. Perhaps more important, the rules of law are not the same from state to state. As I will indicate, this state-by-state approach to product liability law will not resolve the product liability problem. It does not fit the realities of the modern commercial marketplace.

The state-by-state approach to product liability law and the uncertainty in the law it generates have adverse effects on interstate commerce. The adverse effects are felt by wholesaler-distributors and other product sellers who deal in a multi-state or, in many cases, a national marketplace. The adverse effects are also felt by consumers. Why? Because uncertainty in product liability law creates excessive and redundant legal costs that are borne by all of us. Both plaintiff and defendant must pay lawyers to research, brief, and argue the most fundamental points of law in every case, because even those fundamentals are uncertain. The legal costs paid by the injured person substantially reduce his award. The legal costs paid by product sellers are, in most cases, paid by the general public in the form of higher prices.

Further, the current uncertainty in product liability law diverts time and resources from product efforts to litigation-oriented activities. This can and does have a devastating effect on small businesses where the efficient utilization of all resources is essential to the smooth, effective operation of a business. This is especially important in wholesale distribution where economies of scale and dynamics of operation are so crucial to survival, competitiveness and growth.

The routine joining of non-negligent wholesaler-distributors and other product sellers in product liability litigation is a tremendous drain on this industry, and consumers and the economy suffer as a result of it. As I will explain, industry firms must divert resources and pay legal costs in defending product-related suits; yet, they rarely end up paying product liability judgments.

NAW recognized the adverse effects of the product liability tort litigation system as early as 1977. In that year, NAW began to organize a total of 33 state task forces to push for enactment of state statutes that would bring some certainty into the law of product liability. My counsel, Mr. Marchese, can provide you with full details about this effort. Thus far, some 30 states have enacted product liability reform provisions. This activity at the state level has failed to provide the uniformity and predictability that we had hoped it would, although it has focused considerable attention on the need for a Federal statute to resolve the problem.

The individual states simply cannot resolve what is a problem of interstate commerce. The state statutes vary in scope. A few are comprehensive; most are not and, thus, major issues of law are left uncertain. The state laws also vary in substance. Each state has enacted different legal rules. Even when the law is clear and certain within borders of one state, manufacturers, wholesaler-distributors and other product sellers who deal in an interstate market still face the uncertainty about what law will apply.

Having recognized the problems of the current product liability tort litigation system and having tried to address these problems through state action, NAW believes the time for Federal action has come. The problem is one of interstate commerce, and Federal action is appropriate.

NAW has watched the development of S. 44 and its predecessor drafts very carefully over the past two years. A number of changes have been made. Some of those changes we support. Some we do not. But we fully agree with the process that brought about those changes. It has been open, public and fair.

Of special importance to NAW is Section 8, known as the product seller provision. There is some confusion about the purpose and effect of this provision. I would like to put that confusion to rest. The purpose of Section 8 is to save legal costs and the effect will not be adverse to any party, plaintiff or defendant. In fact, the savings in legal costs will work to the benefit of all. Let me explain.

A product seller is in many states treated in the same manner as the manufacturer of the product, even though it has no hand in manufacturing or designing the product it sells.

Thus, a person injured by a product routinely sues and seeks a judgment against all the parties in the chain of distribution. Although a judgment may be obtained against the product seller, the seller almost never ultimately pays the judgment because he is not, in fact, responsible. But, nonetheless, when he has been sued, he must defend in court with the attendant costs of such a defense. Product sellers end up paying less than five percent of product liability payments.¹

Section 8 recognizes that product sellers rarely every pay product liability judgments because they are usually not the responsible party. It will help reduce unnecessary legal costs. Section 8 provides that a product seller will be liable for a person's product-related injury in one of three situations. First, if the harm was caused by the seller's own negligence, the seller is responsible. Second, if the harm was caused by the seller's breach of its own warranty, the seller is responsible. Third, if the manufacturer which actually caused the harm is not subject to service of process or, in the court's view, could not pay a judgment, the product seller will be treated as if it were the manufacturer. In the third instance, the bill assures that harms caused by an unsafe product will be compensated, although not by the truly responsible party. This concept is not in accord with the basic principle of tort law that a person should only be liable for his own fault. NAW originally opposed this aspect of the bill. Nevertheless, NAW recognizes that the Subcommittee has accommodated the interests of those who are injured by products that are, in fact, defective.

NAW appreciates the fact that manufacturers support Section 8. More importantly, NAW deeply values its partnership with manufacturers, insurers, insurance agents and brokers who are all working for a fair resolution of the product liability problem.

I would like to mention, briefly, the current situation with respect to the insurance aspect of the product liability problem. A few years ago, the concern about product liability was focused on the cost of product liability insurance. In response to this concern, this Subcommittee supported and Congress enacted the Risk Retention Act which has helped ensure full and vigorous rate-making competition. As NAW moves toward establishing its own insurance group, I have come to appreciate fully the difficulties commercial insurers face in setting rates. Today insurance rate-making practices are not the issue. The issue is uncertainty in the legal system. That uncertainty affects both those who use commercial insurance and those who self-insure through risk retention groups or otherwise.

In closing, I would again commend the Subcommittee for focusing on a real world, practical problem, one that is of enormous concern to NAW members. The study and work on the product liability problem have been extensive. I express the hope that S. 44 will move to mark-up immediately so that we can all benefit from that effort.

That concludes my remarks. I would be happy to try to respond to questions Committee members might have.

Thank you, Mr. Chairman.

[The following information was subsequently received for the record:]

¹ Insurance Services Office, "Product Liability Closed Claims Survey 35 (1977)."

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Opponents of S. 44 suggest that the bill is a foot in the door for Federal legislation in all areas of tort law. Do you agree with this statement?

Answer. No. This concern has no basis in fact or logic.

S. 44 is not a foot-in-the-door for Federal legislation in all areas of tort law. Product liability has a special connection with interstate commerce that other areas of tort law lack.

For example, in the area of medical malpractice, individual states can provide predictability and stability in tort law. A physician, as a practical matter, engages in all relevant conduct in one state. This is true with accountants, lawyers and other professionals. Even with automobiles, data show that most accidents occur within a relatively short distance of one's home.

The situation with product liability is entirely the reverse. Over 70 percent of products are shipped out of the state of manufacture. Therefore, the law that will apply in case of liability is not the law of the state in which the product is manufactured—as a practical matter the manufacturer, wholesaler-distributor, or other product seller does not know where a claim will arise.

Insurers have recognized this fact and have set product liability rates on the basis of nationwide, not individual state data. Similarly, insurers have recognized that other areas of state law are intrastate and set rates based on state-by-state experience.

This, if one moves from the state of New York to the state of Florida, his or her automobile insurance premiums will differ. They may be higher or lower based on the claims experience in each state. On the other hand, if one moves his or her factory from New York to Florida, product liability insurance costs can be expected to be exactly the same.

Question. Could you describe the status of efforts taken by your association and others at the state level to enact product liability statutes?

Answer. The National Association of Wholesaler-Distributors has acquired extensive experience with the product liability problem and state legislative efforts to address that problem. In the mid seventies the magnitude of the product liability problem within the wholesale distribution industry began to manifest itself in a substantial manner. At that point in time, NAW initiated an extensive review of all of the facets of the problem as it affected wholesaler distribution including consideration of the steps needed to be taken in order to provide necessary solutions.

The results of that review were particularly illuminating. The product liability problem is of major concern in the majority of commodity lines within the NAW membership. It encompasses wholesaler-distributors of both consumer-type and industrially oriented products. It is a problem with national dimensions. The solution to the problem requires legislative action to establish a balanced system for resolving product liability litigated matters.

In its total commitment to a legislative solution to the product liability problem, NAW endorsed a legislative effort at the federal and state level. NAW participated in the White House Conference in the mid seventies and appeared before a Senate Committee which began a study and evaluation of the problem at that time. It soon became apparent that ultimate solution of the problem required federal action, but that because of traditional state jurisdiction in such matters; and because it was absolutely necessary to develop a national awareness of the problem; and the need for and specific contents of, legislative solutions to that problem; it was deemed necessary to approach such a solution in phases, the first phase of which was to operate on a state by state basis to attempt to use traditional means for establishing an awareness of the problem and to develop such legislative solutions as would be feasible attempting at all times to establish a uniform legislative solution from the various states. The first task in this phase was the development of a suggested state statute for product liability matters.

Beginning in 1976, NAW organized and provided support to a total of 33 state task forces composed of wholesaler-distributors of various commodity lines. Their purpose was to advocate corrective product liability legislation at the state level. Working from the blueprint for a uniform product liability statute developed by NAW, the state task forces did achieve success in passing legislation in various forms and with varying degrees of completeness. Bills were passed in 30 states. However, a serious deficiency exists in that few of these bills contain identical provisions, and there is a uniform lack of uniformity running throughout the states on this vital issue.

Thus, some 14 states passed a law exempting non-manufacturing sellers from strict liability; some 23 states passed a repose statute; 13 states passed a law provid-

ing a defense for alteration or modification of a product; 8 states provided a defense for compliance with government standards and lesser numbers of states passed various other laws dealing with an aspect or certain aspects of the problem; but none passed laws comprehensive enough to provide a solution to the problem. A new problem thus emerged, lack of uniformity coupled with incomplete statutes dealing with product liability matters.

For example, the exemption for a non-manufacturing seller in Idaho applies only where the product is acquired and sold in a sealed container or the seller had no opportunity to inspect the product. In Arizona and Arkansas the exemption takes the form of an indemnification requirement. In Illinois the exemption applies as long as the manufacturer is available and can pay a judgment. In Nebraska the exemption applies regardless of whether the manufacturer is available or not, or is or is not solvent.

Repose statutes also take on many and varied forms. In Alabama it is ten years after first use of a product. In Colorado it is rebuttably presumed to be non-defective ten years after first use. In Kentucky the presumption is in place five years after first sale or eight years from date of manufacture. In New Hampshire the repose period starts twelve years after manufacturer. In North Carolina the period of repose is six years.

In Kansas, compliance with mandatory governmental contract specifications is an absolute defense. In Colorado a product is rebuttably presumed to be non-defective if it complies with government standards. There is no uniformity in the newly passed state laws and that as a result uncertainty in product liability matters has increased rather than decreased. There is however one salient factor that is unmistakable; it is that each state that has acted has done so from a firm conviction that the problem is serious and requires an immediate legislative solution. In that respect there is uniformity.

Many badly needed improvements in state laws have been made as each state has addressed some but not all problem areas. Because the laws that have been passed lack the important ingredient of uniformity and because product liability law is uniquely national in character, it is obvious that it is only through enactment of a balanced product liability law at the federal level that the necessary national standards and uniformity of application of such standards can be attained.

Senator KASTEN. Thank you, Mr. Van Dongen.

The next witness, who appears at the request of Senator Frank Lautenberg, is Mr. Karl Asch, an attorney from New Jersey. Mr. Asch, welcome.

Mr. ASCH. Thank you.

Let me first state that it is a great honor for a lawyer from a small city in New Jersey to appear before you. I was somewhat awed by the invitation, but then, as I thought about it, I thought that that is as it should be, because those of us who work in the field, those of us who deal with the disabled and the maimed and the survivors of the dead perhaps can tell you most authentically from our own experience, our training, and our conscience what we think about the bill.

And basically, I believe that this bill is antithetical to the American system of justice. It favors the rich against the poor. It favors the strong against the weak. It favors the perpetrator against the victim of defective products. And I cannot understand why those people in our representative democracy would plump for such a bill.

There was a time, Senator, when as a kid you might have played with a model toy that flew in the air, and I have represented a kid who lost an eye because of the defect, but we were not prescient, and we did not have the knowledge that the manufacturers may have had, should have had when they manufactured that defective toy. You or your wife or your children may enjoy watching television, but would not enjoy it if years later it turned out that irradiation from a defective TV set sterilized any of you.

My clients are at the end of the line. They are the users of the products that others have made and profited by. They had relied upon a promise which is implicit with every product that we buy, sir, that this product is safe, fit for use, and merchantable, and when we deal in the area of product liability, we are talking about a hybrid which is a confluence of the old areas of tort liability and warranty which has given birth to an offspring that permits the law to do justice, and that offspring is called strict liability.

We see nothing in the bill which mentions strict liability. It is dispatched by avoidance. There is an ultimate solution to the question of product liability as it is handled in the various States, and that ultimate solution is to destroy the concept of strict liability.

Over the years, the several States have separately, in a variety of ways, at various times, gradually evolved systems because they are responsive to the people, systems of substantive law designed to protect the rights and enforce the duties of all their citizens. Strict liability is a concept now which has been adopted after years of evolution in the several States, and it would appear to me from my own unsophisticated point of view that perhaps this bill would more appropriately be called the manufacturers and distributors and insurance companies' defective products escape from responsibility and whatever you do, get rid of strict liability act.

This bill is a radical intrusion into the rights of the several States, as if to say that our judges and our juries who reflect the minds and the thinking and the conscience of our several States do not have the wit or understanding to determine what should be done.

Even if I were to accept the proposition that the Federal Government may under the commerce clause rip away the civil law of the various States, I cannot accept a Federal scheme that would be enacted to enhance defenses of producers of products that maim and kill.

Senator, there is a great deal more that I should like to say. I should like to spend days with you and your committee going over point by point what is simply wrong in the bill, because I believe that your mind must be and still is open, and I should like to discuss it with you as a person with experience with those people who have used defective products and merely wish to retain redress to justice.

I will, if you would permit, leave with the committee the copy of the Beshada bill which in New Jersey addresses the way in which product liability cases can and should be handled quite fairly, and I would also, if you will permit, supplement these remarks by a letter to the Committee.

Senator Kasten. Without objection, that information or data will be included when received in the committee files.

I did not mention when I introduced you that you are appearing as well as on behalf of a group of asbestos victims, and I very much appreciate your testimony here this morning.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. Although strict liability is the law in two-thirds of the states, proponents of S. 44 contend that the courts actually apply a negligence standard in most design defect cases. Thus, they contend that enactment of the negligence standard for design defects as in S. 44 would not affect the law in the majority of states. First, do you believe this to be a correct analysis of the law?

Second, wouldn't codification of a negligence standard in design defect and failure to warn cases abrogate the rights of the plaintiff currently enjoyed in the law of two-thirds of the states?

If the proponents of S. 44 contend that the courts actually apply a negligence standard in most design defect cases, I would respectfully ask them to justify that contention. I believe it is an incorrect analysis of the law.

Answer. In strict liability, design defects and failure to warn are viewed from a perspective of what is tantamount to hindsight. The manufacturer and seller should know of the hazards of their products before offering them to potential victims. Those things which precipitate a claim of injury, should have been foreseen and safeguarded against. Thus, strict liability law differs from negligence by permitting plaintiffs to carry its burden of proof more simply than the negligence "prudent man" standard would require. Even in states which have not evolved beyond a lateral recitation of the original concept of the Restatement of Torts 402A, the jury is asked to assume that the seller knew of the product's propensity to injure as it did, and then to decide whether with such knowledge, he would have put such a defectively designed product in the stream of commerce.

With regard to the second part of the first question, it is patent that codification of a negligence standard in design defect and failure to warn cases, would indeed abrogate the rights of plaintiffs currently enjoyed in the law of those states which utilize strict liability. But isn't that the obvious intent of many of the proponents of S. 44, who on a policy basis have decided to regress the law in order to favor manufacturers and sellers of defective products rather than the victims of those defective products?

Question. Proponents have also stated that there may be "some slim margin of difference" between automatic worker compensation payments and strict liability as it is applied in some states. Using New Jersey law as an example, is this true?

Is the trend of state law towards a no-fault or compensation system where no product defect need be proved?

Should we adopt such a compensation system where individual responsibility need not be proved?

Answer. New Jersey law belies the statement that there is only "some slim margin of difference" between automatic workers compensation payments and strict liability. In worker compensation cases there need be no evidence of any defect (or any third party negligence for that matter). Even if the sole cause of harm were the worker's own gross negligence, he would still recover compensation payments. Strict liability law on the other hand entails a panoply of proofs that are the plaintiff's burden, yet if meritorious, he would be entitled to receive much more realistic damages than the relative pittance he might be entitled to in Workers Compensation. And he would be entitled to recover such damages from the actual parties whose defective products caused his injuries.

In New Jersey we are not trending toward no fault in product defect cases. However, it is realistic to assume that product manufacturers and suppliers, and the insurance lobbies who stand behind them and may be the most influential lobbies in the nation, will attempt to push through legislation in each of the states similar to S. 44.

In my humble opinion, we should have a compensation system where individual responsibility need not be proved. My conscience, as well as my mind, cause me to feel that when a person is badly injured or diseased, that we must try to do something for that person. It is not only being our brother's keeper, but it is also enlightened self-interest. But for the grace of God, so go we. And from the standpoint of our entire economic system, I believe that we are better off providing the means for at least a subsistence standard of living rather than options of welfare dole or starvation. However, if anyone were to take the foregoing statements out of context and not add the subsequent statements, then some disservice might be given to the totality of my views. For it is also my opinion that people should be entitled to more than a subsistence if their injuries were caused by the negligent acts or omissions of other people, or if they were injured because of defective products of other people. I believe the fault system is an important part of our system of social mores. We have a criminal system which punishes people for wrongdoing. We also have a civil

system which is not punitive but at least attempts to restore the equilibrium so that an injured person may be fairly compensated for all his injuries, pain and suffering, disabilities, economic losses, medical expenses, and other losses related to his injury. If we were to adopt a completely no-fault system, there would be little to deter the callous or selfish, and there would be little to encourage those who have concern for their fellow men. I therefore think on balance that we should have social programs, including no fault in a workers compensation setting, but of course we must also retain the right to sue in civil court for injuries resulting from negligence and defective products.

Question. How does an increase in the standard of proof from strict liability to negligence create incentives for improved product safety?

Answer. The plaintiff's burden of proof in most cases would be immeasurably burdened and obstructed if strict liability were abandoned. The hybrid concept of strict liability has genetic origins in both tort law and contract law. It has taken the best elements of both parents and discarded anachronisms that are not in the best interests of twentieth century society. Rather than create incentives for improving product safety, the elimination of strict liability would recreate shields behind which uncaring producers and marketers of defective products could hide. Monographs could be written on this single subject but I respectfully believe that each Senator is well aware that a primary objective of the proponents of S. 44 is to make proofs so costly and difficult and in some cases so impossible, that even the most grievously injured may be left without a remedy even if the defectiveness of the product is obvious.

Question. Will federal product liability legislation "straightjacket" the law?

If S. 44 is enacted, do you propose that every time it becomes clear that the law is unbalanced in a specific case, manufacturers or plaintiffs will come to the Congress to amend the law?

Answer. Federal product liability legislation will "straightjacket" the law. But isn't that its obvious intention? I wonder why its obvious effect, if not intent, does not cause revulsion? It would be hyperbole to suggest that the loser of any case might come to Congress to amend the law. Yet S. 44 is not responsive to just any case. It is an attempt by extremely rich and powerful interests to decapitate the law that has gradually evolved through centuries of effort. If S. 44 passes, it would terribly unbalance the law so that causers of injury would be relative heavyweights, while those victimized by their products would be relative flyweights and then both sides would be told that they can go in and fight it out. The results would be preordained.

I believe our Congress intends to do good works, and that in order to accomplish their humanitarian goals they seek to pass legislation that really gives everybody an equal chance. By making proofs impossible or too onerous to be borne by the injured victims of defective products, they would not achieve the goals that they wish to achieve in their hearts and minds. It would be a calamity for our fundamental system of fairness of justice for S. 44 to be enacted.

I respectfully enclose copies of the *Beviga*, *Suter*, and *Beshada* decisions which articulate product liability law in the State of New Jersey, particularly in an industrial setting. The need for strict liability, as recognized by the courts of New Jersey, are clear as matters of law and public policy. I should appreciate it if you would add this letter, along with the enclosed questions that it answers, and also the enclosed decisions of the Supreme Court of the State of New Jersey,¹ to the record in amplification of remarks made by me before your Subcommittee on April 6. Permit me to thank all the members of the Committee and Senate for your thoughtful consideration of these sincere comments.

Senator KASTEN. Our next witness is Mr. John Brown, John Brown & Co., of Washington, D.C.

Mr. Brown.

Mr. BROWN. Good morning, Mr. Chairman. My name is John Prather Brown. I am an economist and the president of John Brown & Co., a consulting firm in Washington specializing in the economics of law and regulation.

Formerly, I was the assistant director for consumer protection in the FTC's Bureau of Economics, and before that I taught economics at Brown University and at the Cornell Law School. I have been working and writing in the area of the economics of legal liability

¹ The court decisions are in the committee files.

for the last dozen years. I am appearing here today on my own behalf as an economist experienced in the economics of legal and consumer protection issues. It is an honor for me to appear before you today, particularly in the company of such a distinguished panel.

In these remarks, let me highlight some of the notions developed in my written statement. The first I would like to point to is where the interests of consumers lie. This is an area where appearances are misleading. In the run of the mill product liability lawsuit, the plaintiff is almost always an individual, a consumer, and the defendant is almost always a corporation, a business.

From that observation, one is tempted to conclude that consumers and plaintiffs have an identity of interests. After all, there but for the grace of God go I.

What is easy to overlook is the fact that the costs of lawsuits are cost to businesses must recover in order to stay in business. When costs go up for businesses, prices go up to consumers. Therefore, the legal rule which increases costs in an industry will increase prices in that industry.

In the long run, then, the parties at interest in the choice of legal rules are consumers of the product in general on the one side and those consumers who have the misfortune to become plaintiffs on the other side. Consumers' interests are then on both sides of the lawsuit.

Consumers and their advocates must balance the benefits of a rule to plaintiff against the costs imposed on defendants which they will end up paying.

The question that faces consumers, their advocates, and their elected representatives is whether or not a proposed legal regime or rule is the best way to finance indemnification from harm and to give incentives to take precautions.

As an economist, I tend to appreciate market tests of hypotheses. If the legal system were such an effective way to indemnify victims, then one could expect it to be widely used voluntarily. The vast majority of accident victims are unable for a variety of reasons to sue someone, so they must go elsewhere to seek indemnification.

Most of us go to insurance companies who are paid according to the insurance policy that we bought, and there is nothing in the law to prevent insurance companies from trying to sell policies which call for hiring people to play the role of lawyers, judges, and juries to consider evidence according to Federal rules and litigate the amount the policy should pay in each and every case.

This is an implausible suggestion precisely because legal procedures are so cumbersome and expensive. When people are free to choose in markets, they invariably use more streamlined and effective ways to choose a number.

In the case of indemnification of injuries, insurance companies and their customers tend to have bona fide bills paid and any further indemnification come from a previously agreed upon schedule.

The point here is that the legal system fails the market test as a way of indemnifying people. The system should be designed to invoke it as infrequently as possible. The legal apparatus should be used only in an emergency, and that emergency in this context is

where there is a serious allegation that someone has been negligent, that someone has not been taking adequate precautions.

The other point that I would like to make is that the negligence rules developed by common law courts have been greatly underestimated as a system for sending proper incentives to potential tortfeasors.

The critical incentive is the incentive for the parties to take the proper amount of precautions. Under a negligence-based rule, when a simple profit-oriented firm faces a decision about how much precaution to take, it can minimize its costs by meeting the standard of care, by acting reasonably under the circumstances. Taking less precautions exposes it to greater liability than the savings would warrant. Taking more precautions does not further reduce his exposure.

Under these rules, he does well by doing good. In contrast, I think that strict liability rules have been greatly overestimated as providers of proper incentives for precaution. Except in unusual circumstances, they will not do as well as negligence rules.

If a system switches from a negligence rule to a strict liability rule, one can expect profit maximizing firms to respond to changes in precautions by buyers. As buyers reduce their precautions, sellers will attempt to offset that reduction as best they can. However, they will not be as effective on the margin as buyers would be. The next effect of the move from negligence to strict liability would not be a decrease in accidents, but if anything, an increase, and certainly an increase in the overall cost of the system.

Thank you. I would be very happy to answer any questions.

[The statement follows:]

STATEMENT OF JOHN PRATHER BROWN, PRESIDENT, JOHN BROWN & CO.

Good morning Mr. Chairman and members of the Subcommittee. I am John Prather Brown, President of John Brown & Company, consulting in the economics of law and regulations. Formerly I was the Assistant Director for Consumer Protection in the Bureau of Economics of the Federal Trade Commission and before an associate professor of economics at the Cornell Law School. I have been working and writing in the area of the economics of liability law for the last dozen years. I am appearing here today on my own behalf as an economist experienced in legal and consumer protection issues.

The central issue in the modern development of product liability law is the scope of strict liability standards as opposed to the scope of negligence standards. When and under what circumstances is it sufficient for a plaintiff to allege that the product or the conduct of the defendant caused him harm, and when must the plaintiff go further and show that the harm caused could have been prevented by the defendant's exercise of reasonable care? By and large, the modern history of product liability law has been that of the expansion of the scope of strict liability. The historic development of product liability law is too rich and complex to describe here.¹ The Product Liability Act or Kasten bill presently before the Congress if passed would be a major step in that development.

The Product Liability Act proposed by Senator Kasten (the Kasten bill) would be a major reform of product liability law in the United States. It would replace all federal and state statutes as well as common law dealing with product liability and replace them with a uniform federal statute to be administered by state courts, not federal courts. The scope of the bill is remarkably broad: any civil action for harm caused by a product that presently would be based on strict liability, negligence, breach of express or implied warranty, failure to warn or instruct, or any other theory that would lead to an award of damages for harm by a product, would come

¹ See Richard A. Epstein, *Modern Products Liability Law*, 1980, Quorum Books, Westport, Connecticut for a thoughtful and detailed analytical view of that development.

under the Act if it becomes law. It is therefore a fundamental reform and worthy of the closest scrutiny. The major features of the bill are: first its uniformity across states, and second, its clear limits of strict liability to defects in construction or manufacture and breaches of express warranty. In design defect and failure to warn cases the plaintiff would have to prove negligence. The bill would not apply strict liability to design cases and would clarify the limits on failure to warn cases. This limitation of strict liability is the central substantive effect of the bill, though there are other important effects as well.

Product liability reform efforts over the last 10 years are to a large extent a response to the increases in both frequency and amount of product liability judgments.² A few years back, in 1974-76, there appeared what many called a crisis in product liability where product liability insurance losses increased greatly, premiums went up sharply, sometimes so much so that some firms chose to go without insurance.³ Also there were a number of cases reported that seemed to push the extent of the liability of manufacturers beyond the pale. The states responded with a variety of statutes, and the federal government responded in a number of ways. In 1975 the Commerce Department developed the Uniform Product Liability Act, intended for uniform adoption by the states. To date no states have adopted it in its entirety. In 1981 Congress passed the Risk Retention Act of 1981 which permitted manufacturers in the same industry to band together to form risk retention groups and self insure as a way to get around the difficulties and high cost of product liability insurance.

Prior to the bill presently being analysed there were two staff drafts. There have been substantial changes from the first draft to the present bill, most of them significant improvements. In order to be brief, we focus entirely on the bill itself and not at all on the earlier drafts.

THE CONSUMERS' INTEREST

Much has been said about the effect of the Kasten bill on plaintiffs and on defendants. Much has been said about the effect of the bill on business. However, very little has been said about the effect of the bill on consumers.

In almost every case the plaintiff is a consumer and the defendant is a corporation. From that it is easy to jump to the conclusion that the interests of plaintiffs and the interests of consumers are identical. They are not. All plaintiffs are consumers, but not all consumers are plaintiffs. Furthermore, we can be sure that when all is said and done, all the costs of the system will be paid by consumers.⁴ If there is a legal change that increases benefits to plaintiffs, then all consumers are paying higher prices in order to finance the benefits to some consumers. Consumers at large must balance any benefits to plaintiffs against costs to producers that will ultimately be passed on to them.

Logically and analytically, a change in the legal system which increases benefits to plaintiffs and increases the cost of goods can be looked upon as a kind of insurance policy. It is a policy sold bundled with the goods. It is paid for when the goods are bought and it pays off if and when one is a plaintiff. The value of the legal change can then be analysed in the same way one analyses an insurance policy: by comparing the premium (the increase in the cost of the goods), with the product of the payout (the amount collected by the plaintiff) and the frequency with which one is likely to become a plaintiff.⁵ Much of the public discussion of the effects of the bill focuses on one of the items, but seldom on all three. Unsurprisingly, business commentators focus on the costs, and trial lawyers focus on the benefits to plaintiffs. It behooves consumers and those who advocate on their behalf to take a broad-

² The literature on the product liability crisis is vast, too large to be chronicled here. A central document in that literature is the Interagency Task Force on Product Liability, *Final Report* (National Technical Information Service (NTIS)), Springfield, Virginia; Accession No. PB 273-220; 1977. Also there have been numerous hearings before the Senate and House Commerce committees on the Risk Retention Act and on Product Liability in the last few years.

³ See the *Task Force Report* at III-56.

⁴ There are complexities here that would require equivocation in the presence of purists. Depending on the elasticities of supply and demand and on the nature of the labor and capital markets, the costs of the system can be shared by consumers in their role as suppliers of labor or suppliers of capital. In the textbook case of a competitive industry with a perfectly elastic supply, all cost increases will be fully reflected in the price of the goods. At the level of generality that is appropriate for discussing changes in the entire law of product liability, it is appropriate to think about all bills being paid ultimately by consumers.

⁵ The relationship between legal changes and standard form insurance policies is developed in Brown, "Product Liability: The Case of an Asset with Random Life," 64 *American Economic Review*, 149, March, 1974.

er view. If consumers pay the bills, and certainly they do, then they should be concerned about the costs.

An example may illustrate the point. A few years back, a student project at Cornell investigated the economics of ladder-related accidents. They found out that on average there was one serious accident, where serious is defined by emergency room reporting conventions, per home ladder every 10 years, and that the average life of a home ladder is 10 years. If as an approximation ladders cost \$50 and accidents cost a thousand dollars, then the undiscounted accident costs outweigh the ladder costs by 20 to 1. The great proportion of accidents result from rank amateurs doing things from ladders that a moment's reflection would show to be silly: reaching too far, putting the ladder on an uneven footing, inadequate levelling of the ladder, or using an aluminum ladder near a live wire. All of these mistakes are so human and so frequent that they are foreseeable, no matter how unreasonable. If all of these accidents were the financial responsibility of the manufacturer and the transaction cost of lawsuit were equal to the size of the award, then the price of ladders would have to go up fortyfold. Obviously, much is left out of this calculation: discounting future costs would reduce it by perhaps half, ladder manufacturers would not be held responsible for all ladder-related accidents, even under the strictest strict liability, and so forth. Nonetheless, the point remains that the cost of accidents outweighs the cost of ladders. Forcing ladder manufacturers to bear those costs through the legal system would be very expensive indeed. The ladder business is probably very close to perfectly competitive so that all increased costs would be borne by consumers. The offsetting benefit to consumers would be a reduction in the cost of their health and disability insurance, which would otherwise pay most of the costs but without incurring any legal fees. It is extremely unlikely that consumers at large would benefit from shifting the financing of the costs of these accidents when there is no negligence on the part of the manufacturer from health and disability insurance to the legal system. On the contrary, in all likelihood it would be preferable to finance all these costs through health and disability insurance. In that way the insurer need not enter the murky swamp of the courts to determine who pays; the insurer simply pays the medical bills.

LIMITS OF THE ANALYSIS

In its classical form, an economic analysis of a proposed legal change like the Kasten bill would carefully compare the proposal with the existing law, suggest hypotheses based on economic theory and practice, and test them against empirical data. Several facts work together to prevent a classical analysis here. First, the law that the Kasten bill would replace is extremely diverse and difficult to identify. It is indeed one of the major purposes of the bill to provide a uniform product liability law for the country as a whole. Presently, the law is so complex that a large part of the income of the product liability bar is earned by informing clients of what the law is that the client is subject to. It would be impossible to be complete in identifying the present law of product liability in a study like this one.⁶ Therefore, in the same way that all other commentators on the bill and on products liability are restricted, this analysis shall be restricted to informal and impressionistic descriptions of present law.

Second, there is no significant body of publicly available empirical data against which one can test the many available hypotheses about the effects of the Kasten bill. There are anecdotes galore about improbable accidents, but there is no body of data available. Therefore one is driven to the conclusion that neither is there a body of data available that shows the need for tort reform, nor is there a body of data available that shows that tort reform is unneeded.

Like all other contributors to the discussion of product liability reform, I am limited to non-statistical forms of analysis. Still, the discussion is distinctly economic. It focuses on the impact of the law on real economic decisions, decisions on how carefully to build on behalf of others and decisions on how careful to be on one's own behalf.

Clear thinking about liability rule reform requires a clear understanding of the purposes of tort liability. Traditionally, commentators have identified two major purposes of liability rules. First, liability rules compensate victims for losses from

⁶ See, for example, "Products Liability at a Glance—1982," a wall chart prepared by the University of Miami Law and Economics Center, that characterizes the products liability law of 51 jurisdictions according to 77 categories. See also the Commerce Clearing House Products Liability Reporter for complete coverage of the area.

accidents. Second, they provide incentives for parties to take precautions. For both purposes they are seriously flawed instruments.

For compensating victims, the instrument of tort law is also inept. Certainly the great preponderance of accident victims do not successfully sue someone, and when they do the transaction costs are large. It is very expensive to transfer a dollar from one party to another through legal proceedings. A 1971 Department of Transportation study of automobile accident liability said, "The automobile accident tort liability insurance system would appear to possess the highly dubious distinction of having probably the highest cost/benefit ratio of any major compensation system currently in operation in this country. As has been shown, for every dollar of net benefits that it provides to victims, it consumes about a dollar."⁷ Insurance companies are likely to do the job much better. System design should encourage the use of insurance wherever possible, rather than depend on the vagaries of tort law to provide what is essentially insurance.

Precautions are costly, but they determine how many accidents the society will have. One can spend too much or too little on them either as an individual or as a society. The law of product liability is a system of incentives for decentralized decisions about precautions. Our analysis is focused on whether or not the proposed changes will lead to better or worse decisions.

A good incentive requires a clear signal: "You will be spanked if you are not home 5 minutes after the street lights go on." The child may or may not come home on time, but certainly the incentive is clear and unambiguous. In contrast, a potential defendant, making design decisions about the strength of a cross beam, say, has at best vague signals about his potential liability.

Even though the manufacturer's incentives are so attenuated through the system, they are no less real. This is a classic example of decisionmaking under uncertainty; it is part of the cost of doing business. The Kasten bill would remove some of the uncertainty by making the statute uniform across the states. Much of the uncertainty would be present in any conceivable legal system. It is a necessary adjunct of applying general notions of reasonable behavior to very specific facts about particular cross beams.

THE ECONOMICS OF PRECAUTIONS

The analysis of tort law reform has important analogues in classic micro-economics. The analogue is a problem in the standard theory of production, the simplest example of which is where two costly inputs like labor and capital are combined to produce one valuable output like a widget. The classic parts of the problem are first; to conveniently describe the available technology, second; to characterize the market equilibrium, how much labor and capital will be used to produce how many widgets, what will the prices of the inputs and the outputs be, and how will the equilibrium respond to changes in technology or relative prices, third; to characterize an optimum, what is the best combination of labor and capital and what is the greatest amount of widgets that can be produced from that combination, and fourth; to compare the market equilibrium and optimality. This so-called optimum is what is meant by an efficient allocation of resources. It represents taking best advantage of the available technology given relative scarcity of resources, both inputs and outputs. An allocation is efficient if there is no reallocation that give more output without giving up a greater value of inputs.

There is a production problem that is imbedded in the issue of tort reform, and it is the solution of that production problem that is the core of the tort reform issue. The simplest case of the production problem is the case where there are two costly inputs, two precautions, which are used to produce one valuable output, accident avoidance. The production of accident avoidance is likely to be an ordinary production process in that more of any precaution will reduce accidents and that precautions are substitutes for one another.

Centralized precautions.—If the two precautions are controlled by the same party or firm and the costs of the accidents when they occur are borne by that same party or firm, then we have the centralized problem and the economics of precautions is just an ordinary case in the theory of production. The single owner has every reason to balance the costs of precautions and to weigh the costs and the benefits of accident avoidance properly. The single owner is the paradigm for the "reasonable man acting reasonably under the circumstances."

⁷ U.S. Dept. of Transportation, "Motor Vehicle Crash Losses and Their Compensation in the United States," (1971) pages 94-100.

Precautions decentralized through markets.—The next step in the analysis is the case of decentralized control where the parties have the ability to buy or sell precautions with negligible transaction costs. Under these circumstances we can again expect the efficient allocation of resources. When parties are in a close and knowledgeable contractual relationship, that relationship is likely to be efficient and there is no social purpose in interfering with it. Part of the attraction of strict liability comes from our intuition about contracts. Strict liability in the enforcement of contracts makes eminent good sense; it is the enforcing of contracts.

Precautions decentralized by product liability law.—The standard tort problem is different. When a pedestrian is hit by a car with defective brakes, there is no centralized control. When a television set overheats and starts a fire there is no effective market for precautions among knowledgeable parties. In these cases the production of precautions is decentralized, but it is not coordinated by a central authority and it is not coordinated through a market among knowledgeable parties. Instead the burden of coordination is carried by the legal system and by reputation effects in the marketplace. Reputation effects are powerful though not necessarily precise as the manufacturers of Chevrolet Corvairs and DC-10's will attest.

Product liability law provides incentives for the production of accident avoidance. It does this by the incentives that it gives to the various parties who control precautions: the manufacturers, the sellers, and the buyers. The incentives are generated by court decisions about who has to pay how much when an accident happens. Precaution decisions have two potential impacts on the potential liability of the party: the greater the precaution, the less likely an accident is and therefore its resulting liability. Second, if there is a legal standard of care which if met prevents liability, then there is an incentive to meet that standard which depends on the frequency and costs of the accident and the cost of the precaution. These issues have been investigated in a simple, analytically tractable setting with relevant results.

In general, negligence-based rules can be expected to provide better incentives for precautions than rules based on strict liability. Under a negligence rule, parties have proper incentives, that is the incentives to take the same level of precautions that they would if they were under central control or tied through perfect markets.⁸ In general, strict liability does not provide proper incentives.⁹ Under strict liability, there is too much precaution taken by the defendant and too little by the plaintiff. In that same simplified world one can show that even though the defendant has an incentive to take greater precautions than under a negligence rule, there will be more accidents under strict liability than under a negligence rule.¹⁰ Only if for some reason plaintiffs' decisions about precautions are totally independent of these financial incentives does this problem subside.

One of the alleged virtues of a strict liability standard is that it is simpler and cheaper for the courts to handle than a negligence standard. That is true when the identity of the defendant is obvious. In many situations, this virtue is more apparent than real. A hypothetical example will illustrate the point. A home computer was being used to control the owner's home heating and air conditioning system in order to save energy. The homeowner goes away on vacation with his system hooked up and comes back to find his house burned down and some people injured because the heater stayed on the entire time. The computer survived the fire intact but there is no evidence of any out of the ordinary problems. Obviously something went seriously wrong somewhere, but no one knows what. It could be anywhere. In the interest of simplicity, assume that the buyer did not alter any of the hardware or software, but carefully followed all directions. Furthermore, all parties agree that this use of a home computer is quite foreseeable. All the hardware and software and connections were bought from a single supplier, Radio Shack.

This is a classic case for strict liability to handle. It is a relatively simple lawsuit. In the language of the bill, "the product is unreasonably dangerous in construction or manufacture since it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer." A negligence rule would require a greater effort on the part of the plaintiff to find out what went wrong, what additional precautions would have helped and why it would have been efficient to have included those precautions. It makes for a much more complex lawsuit.

⁸ For proof of that proposition See Brown, "Toward an Economic Theory of Liability," 2 *Journal of Legal Studies* 323, at 340.

⁹ *Ibid.* at 338.

¹⁰ See Brown and Holahan, "Taxes and Legal Rules in the Control of Externalities," Cornell University Department of Economics Working Paper No. 145, April 1977, Appendix D, for a parallel demonstration.

Now let us change the hypothetical slightly, so that the computer, the software, the peripherals, and the connections to the thermostat had all been bought separately from different suppliers. In turn the computer was simply assembled and marketed in the garage of a one person firm from parts bought around the world. This is not an uncommon situation in the market for computers, nor is it unusual in general. There may be hundreds of "manufacturers" ("any person who is engaged in a business to design or formulate and to produce, create, make, or construct any product (or component part of a product" section 2 (6)) involved in the case. Now strict liability is no longer so simple. The technology and the physical facts have not changed, we have only changed the organization or ownership of production. But the benefits and simplicity of strict liability disappear. Now the issue before the court in strict liability will be causation: which component's failure caused the accident? The plaintiff must hunt for a causal relationship in the same kind of detailed factual inquiry that strict liability is intended to avoid. Accidents happen in a complex world, and the more complex the environment the less well adapted is strict liability. Note that the symmetry between plaintiff and defendant is destroyed by this complexity. It is in the melancholy nature of things that victims of accidents always know who they are.

Under a negligence rule, the inquiry is largely independent of the organization of production, regardless of how complex the environment might be. It would be an inquiry into the economics of precautions, a search for a precaution that could have been taken, should have been taken, and was not taken. The negligence inquiry has the virtue also of dealing with the essence of the matter: were the appropriate precautions taken? Furthermore, the inquiry will generate precedents, precedents which will be useful to later decisionmakers because it helps to inform them about the nature of the standard of care to which they shall be held. In contrast, strict liability precedents will not generate precedents on the standard of care that parties should adopt since the standard of care is not at issue.¹¹

Still, there will be cases where a strict liability standard is cheaper to administer, and that is where the plaintiff can point to the manufacturing defect. That lower cost of administration may well outweigh the inferior incentives of strict liability. Then the only ambiguity is where in the chain of suppliers the liability should lie. If there is a failure of the computer's disk drive motor armature, then who is strictly liable, the computer manufacturer, the disk drive manufacturer, the disk drive motor supplier, or the disk drive motor armature supplier?

This last caveat provides a rationale for the Kasten bill's distinction between manufacturing defects which are handled under strict liability, and design and warning defects which are treated as matters for a negligence standard.

To restate, the incentive effects on precaution-taking suggest that a negligence-based rule is to be preferred to a rule of strict liability. Negligence-based rules are preferable as well from a long term jurisprudential point of view because they will generate precedents and direct judicial discussion of standards of appropriate care which will help inform decisionmakers.

THE COST OF THE SYSTEM ITSELF

A major economic consequence of the product liability system is the cost of operating the system itself.¹² The products liability industry is very large, though I know of no estimate of its size; certainly, however, it is larger by any measure than any foreign system. Changes in the system which reduce the cost of the system therefore have great potential benefit. Costs of the system can be reduced by either invoking the system less often, or by making it less expensive when it is invoked.

There are two ways to reduce the costs of the system. First, the number of transactions can be reduced. The clearer and more widely understood and accepted is a rule, the more likely is settlement rather than costly litigation. The more the doctrine is to let victims bear the costs of accidents, the fewer cases there are.

The other way to reduce transaction costs is to improve the process for each case. From this perspective, per se rules and bright line standards are attractive. However, as any lawyer knows well, the problem with per se rules and bright line standards comes about when they are wrong; sometimes the bright line is not in the middle of the road.

¹¹ See Cooter, Kornhauser, and Lane, "Liability rules, limited information, and the role of precedent," 10 *Bell Journal of Economics* 366, Spring, 1979.

¹² See Guido Calabresi, "The Cost of Accidents," Yale, 1970, which is the classic work which first addressed the economics of accidents, pointing to the important possibilities of substitution among types of costs. It is the precursor of most modern work in the economics of torts.

THE RESPONSIBILITY OF MANUFACTURERS

A. For Defects in Construction and Manufacture.—Manufacturers are liable if: When the product left the control of the manufacturer the product deviated in a material way—(1) from the design specifications formula or performance standards of the manufacturer; or (2) from otherwise identical units manufactured to the same manufacturing specification or formula. [Section 5(a)(1)].

The first part of this provision appears to put the limits of the defendant's liability into his own hands, since he controls the design specifications and performance standards of his own products. If a product met the standards or specifications of the manufacturer, but there was still an injury, the manufacturer should not be held liable. It would appear possible for the manufacturer to set specifications and standards freely but be required to meet whatever standards he set. By putting the definition of "defect" into the hands of the manufacturer, the bill allows the manufacturer to limit his responsibility. Under the bill it appears that he could choose not to be simply an insurer of product failures.

If the manufacturer chooses to set and meet standards that are higher than industry standards, then he would be held to those higher standards. One can have little difficulty with holding someone to high standards which he has freely chosen and most likely are reflected in higher than standard prices. By the same token, if the manufacturer chooses to set standards that are lower than industry standards he should only be held to those lower standards, especially when customers have benefitted from the lower standards and lower costs by having to pay a lower price. Manufacturers and consumers both can benefit from the diversity that deviating from industry averages allows. We can be confident that when a manufacturer improves on industry standards he will find a way to communicate his improvement to his customers.

If he manufactures to a standard lower than industry standards, then in order to be protected by those lower standards from liability he must take responsibility to inform his customers of those lower standards. Otherwise, the system would find itself in the awkward position of condoning the passing off of inferior goods as industry standard. In the case where the manufacturer chooses a lower than average standard of design or performance there are important difficulties and complications.

The first potential problem with this part of the bill is that limiting liability to design specifications or performance standards is contrary to much of judicial thinking on these matters, the theory of enterprise liability, as well as contrary to one of the oft-stated purposes of tort law, to compensate accident victims. Courts may simply interpret the statute away from what appears to be its plain language, and find ways to ignore these limitations. Of course, insofar as that is the case, the statute will have failed its purpose.

Another potential problem comes from the interaction of provisions for construction defects and provisions for design defects. Consider a manufacturer who carefully chooses a design which is more dangerous than industry standards but is significantly cheaper, intending to appeal to a particular subset of the market who can best handle the danger. When there is a failure, even one fully contemplated in the design standard, a potential plaintiff will be inclined to try to show that the design was negligent. The plaintiff could show that other prudent manufacturers did not produce the design, that the manufacturer knew about the danger, and that there was a practical and feasible means to eliminate the danger, that is, follow industry standards.

One final complication is that there may be a contradiction with the provision that says that the product is defective in construction if it deviates in a material way from otherwise identical units in the same product line. Which provision would control if the performance standards admitted of possible but infrequent variations in the product which made the particular item materially different from otherwise identical units of the same product line? Could a manufacturer protect himself from occasional failures, or would courts and juries be inclined to hold him accountable anyway? If so, the careful language would be a waste and manufacturers would find themselves acting as insurers.

If one reads the bill's treatment of design specifications and performance standards in this way, they become very close substitutes for, and to some extent play the role of, warranties. Section 7 of the bill deals directly with express warranties. There, if the manufacturer made an express warranty about safety on which the plaintiff relied, but which was untrue, then the manufacturer can be found liable. It appears that the role of the warranty in the bill is quite parallel to design specifications and performance standards.

When the manufacturer is silent about his design specifications and performance standards, the bill, through its "reasonably prudent manufacturer" language, holds him to industry standards. This seems to be entirely appropriate, because it reduces the cost to customers of having to verify the quality of product that a manufacturer is building. The language is a legal analog to management by exception. Unless there is some explicit statement to the contrary, the consumer is justified in assuming that a particular product is no better or worse than industry standards. If manufacturers want to build something better or worse than the standards of the industry, then they must apprise their customers of the fact. The legal system will not protect them in any efforts to pass off inferior goods.

Now consider the second part of the provision, dealing with material differences from otherwise identical units. The draftsmen seemed to have an implicit model of production or construction, on which they fit a sensible law. The implicit model was that of mass production on a production line where the phrase, "run of the mill," makes sense. There are large numbers of products produced and they usually differ from one another by very little. In that context, manufacturers are held liable for products that are not run of the mill. Strict liability is attractive here because of the strong affinity of the context to contracts. The manufacturer holds himself out to provide the run of the mill product and when he instead provides something materially different, there is a strong argument for enforcing the implied "contract." The contract analogy is strong and persuasive in this context.

However, there are other types of production, production where there are significant differences among units as an ordinary matter. In those cases sorting is an essential part of the production process. These different units are then typically sorted or graded according to some standard, either chosen by the manufacturer or given to him. Processes where purity is important are often of this kind, and so are processes with important animal or vegetable components. In these cases the legal standard of otherwise identical units is artificial.

A very simple example that illustrates the point, even though the analogy is stretched, is the sorting of crystals of a powerful chemical by size when they are packed. The size of crystals is uniformly distributed say from one to five microns in diameter. It is standard practice to roll the crystals down a chute which has holes of increasing size in it. At a two micron hole, all crystals smaller than two microns will fall through, and all larger crystals will continue to roll. In this way the crystals are sorted depending on the size of the holes. In principle, the producer can sort as finely as he wishes, with costs increasing with fineness, and he can disclose more or less, but greater disclosure costs more. He can also describe the distribution of crystals in each bin in different ways: he can describe the crystals from two to three microns conservatively as "greater than 2 microns," or expansively as "up to 3 microns," or describe the mean "average 2.5 microns."

To fit this production process into a product liability context, however artificially, let us assume that occasionally someone will get hurt if the crystal is too small for their particular purpose.

What then are the responsibilities of this producer under the bill? Often it makes good economic sense to avoid all the costs of sorting and pass on the problem and the resultant savings to the customer. But under the provisions of the bill, can he decide to be simple and cheap and not sort at all while simply describing his wares as crystals? If he did and someone were hurt by one of his crystals would he be liable for the crystal having deviated in a material way from otherwise identical units of the same manufacture? Is there any way that he could have adequately disclosed or warned in order to be free of liability? The statute does not make that clear.

Another possibility is that he chooses to sort into one micron grades, since for the overwhelming majority of customers, a variation of up to a micron is immaterial. But along comes someone for whom a quarter of a micron variation turns out to be critical. Is the manufacture liable to that person without regard to whatever he discloses, or can he save the day by labeling conservatively?

B. Design Defects.—The standard for design defects is basically a negligence standard, the test being whether or not "at the time of manufacture a reasonably prudent manufacturer in the same or similar circumstances" would have used the design that the manufacturer used. The essence of a negligence standard, for our purposes, is the question of whether or not there exists a precaution that the manufacturer could have taken, should have taken, and did not take. "Should have taken" means that all things considered, the benefits of the precaution outweigh the costs.

C. Disclosure of potential hazards.—The disclosure of potential hazards is an important precaution which plays a critical role in any system of accident prevention

and accident prevention law. First, under the Kasten bill disclosure would appear to provide an affirmative defense for a manufacturer. If the manufacturer provided a clear warning of the particular hazard, then he could try to make a case under section 6(d)(2)(A) that he is not liable because a reasonably prudent product user would have recognized the hazard as obvious, if the warning was obvious. If the warning were well broadcast, then he could claim that the hazard was a matter of common knowledge to persons in the same or similar circumstances as the claimant. Some provision like this is appropriate precisely because it will often be the case that the most efficient precaution for a hazard is not to get rid of the hazard, but to warn users of its existence. Often the best resource to use as a precaution is the good sense of the user.

Failure to provide a warning is a separate cause of action under the bill. The bill provides that a manufacturer is liable for failing to provide warnings or instructions about a danger connected with the product.

There is a large potential for mischief in failure to warn cases, a potential which seems to have been mitigated by careful draftmanship here. The mischief can come about in the argument about whether or not the warning was adequate. The temptation for plaintiff's counsel is to argue that since the warning did not prevent the accident, the warning was clearly inadequate. Warnings can always be bigger, better, and more vigorous. The best defense, and the appropriate issue is to consider the overall cost and effectiveness of the warning itself.

The way that the Kasten bill handles disclosure of potential hazards is to explicitly mention what a reasonably prudent manufacturer would do "given the likelihood that the product would cause harm of the type alleged . . . and given the seriousness of the harm." [6(c)(1)(B)] Appropriately, this language calls fairly explicitly for analysis of the costs and benefits of the warning, which would presumably vindicate the lack of a frivolous warning. I believe the bill would be strengthened if language were added parallel to section 5(e), suggesting that plaintiffs bear the burden of proposing alternative warnings that meet the same criteria that alternative designs have met. Nothing focuses a litigator's mind better than having to come up with a real live alternative, rather than just taking pot shots. Where there are legitimate causes of failures to warn, the burden of proposing an alternative would not be severe.

Whenever there is a known defect or known possibility of a defect, one of the potentially available actions by the manufacturer is to warn the customer of the actual or potential defect. Therefore almost any defect case can be turned into a warning case.

When the harm is a failure to warn then the damage measure ought also to fit the harm. The damage from a failure to warn will be different from the damage from a defective product in general, with the damage from a defective product as a upper bound.

Contemporary technology.—One of the clearest efforts of the draftsmen of the bill is to only hold the defendant responsible for use of the technology available at the time of the design decision. That is, defendants shall not longer be held accountable for not providing precautions which were not available at the time of manufacture. Such a liability is quite out of place in a contractarian and negligence framework.

The arguments to hold defendants responsible for technological developments after their decisions were made, which were ingenious, have been couched in terms of the "risk of technological change." The courts have been asked who was better able to bear the risk of technological change, the victim of the accident or the defendant. It was a short step in some cases to argue that the defendant was better able to bear the risk, so he should pay. This argument runs entirely to the compensation or insurance function rather than to incentives. When the major purpose of the law is to provide proper incentives to parties to take correct precautions it makes no sense whatsoever to require them to do the impossible to avoid liability.

RESPONSIBILITY OF DISTRIBUTORS

In the language of the bill the usual defendant is a manufacturer as opposed to a product seller who is not a manufacturer. Under Section 8, a product seller can be brought into a product liability action if the plaintiff can show that the product seller failed to exercise reasonable care. In other words the product seller is under a negligence standard under all circumstances while a manufacturer is under a strict liability standard for manufacturing defects. That general rule is subject to one exception: where the manufacturer is for some reason beyond the reach of the court, then the seller can be held liable as if he were the manufacturer. The legal

distinction between a manufacturer and a seller is based on the underlying economic distinction.

The economic distinction between a manufacture and a product seller is not always an easy one. In order to transform raw materials, capital, and labor into saleable items at the right place and time for the ultimate user there are a number of transformations in kind, place, and time that have to be made. Each party in the overall production process usually engages in some of each type of transformation: physical production, transportation, and storage and each type of transformation has a potential for failure or negligence that could cause potential harm to the user.

Our legal system is profoundly one-on-one in its structure. It is designed to deal with two parties, one ending up the winner and the other the loser. In a simple economy most transactions are truly one-on-one; anyone not party to the transaction is usually quite unimportant to the transaction. Modern economies do not work that way. Consumer transaction has usually been an incredibly complex tree of transactions. Consumer electronics, for example, start as sand on a beach which is made into silicon from which a chip is made. Design, manufacture, assembly, and merchandising at every level are often totally separate, often done in different countries.

Bad decisions anywhere in the tree have the potential to harm consumers. It is the goal of a legal system like ours to properly sort through that complex tree of transactions where there is a harm in order to find the party most likely to have neglected appropriate precautions, and haul him into court. Not only is it important to bring the right party into court, it is also important to make sure that the wrong parties are not brought to court, for the simple reason that defending oneself in court is a very expensive proposition, even if one is innocent.

It is presently a common plaintiff's strategy to try to join as many parts of the transaction tree as possible to the action, and leave them with the responsibility of separating themselves. This is a costly business, and it is the effect of this section of the bill to reduce it without making it impossible to sue a seller when he is negligent. The structure of the bill tells plaintiffs that as they go up the tree they should keep ignoring parties to the transaction until they either find someone negligent or until they find a "manufacturer." Obviously, there will be difficulties whenever one tries to force a very complicated tree-like set of relations into a very simple one-on-one legal system that was designed to handle cases with one plaintiff and one defendant.

A negligence based system is much better at dealing with the complexities of modern manufacturing and distribution than is a strict liability system. A negligence system basically causes the plaintiff to sort through the transaction tree until he finds someone who neglected to take a precaution that he should have taken. A strict liability system causes the plaintiff to sort till he finds the first party large enough to pay the bill and hold him strictly liable.

It is quite consistent with the thrust of the rest of the bill that negligence should be the standard for wholesalers, retailers, and other product sellers who are not manufacturers. The effect of section 8 is to force plaintiffs to go as far back in the chain of production as is necessary to find the party that is at fault.

Misuse or alteration.—Section 10 of the bill provides that whenever there has been misuse by anyone other than the manufacturer which caused the harm, then the damages from the manufacturer shall be reduced or apportioned to the extent the misuse was a cause of the harm. Now since section 9 reduces damages whenever there is negligence, contributory negligence, or assumption of the risk by the plaintiff, this companion section would seem to simply serve the purpose of codifying and clarifying that what it calls misuse or alteration is a form of contributory negligence. Certainly courts could have reached that result without the codification in a negligence setting, though not easily in a strict liability setting.

Interaction with workman's compensation.—The interaction between two totally different systems with quite different goals is bound to be difficult. The Kasten bill deals with the interaction by putting worker compensation first. It would reduce the damages to which an injured person is entitled by the amount of worker compensation paid plus the present value of all worker compensation benefits to which the worker would be entitled. Furthermore, employers or insurers would have no subrogation rights against the manufacturer. The effect of this is to reduce the value of suits by the amount of the compensation, and thereby reduce the number of lawsuits substantially. First it will remove those suits for less than the amount of compensation. Second, it will reduce the likelihood that it will be brought. Finally, it will reduce the rewards to plaintiff's attorneys for any given proportional fee. In the other direction, by decreasing the cost of the suit it would increase the likelihood of settlement by the manufacturer.

The major benefit of the change is to reduce the cost of the indemnification, probably substantially. The problems are that manufacturer's incentives may be attenuated. The bill does not bar suits by compensated workers; it reduces any damage awarded by the amount of the compensation. Now many feel that worker compensation is too low. This bill will not exacerbate this; if anything, it will alleviate it. Workers will be able to supplement their compensation when products were clearly defective.

TIME LIMITATION ON LIABILITY

Section 12 prohibits actions brought for harms caused by capital goods more than 25 years old, unless there is fraud, or the harm was caused by the cumulative effect of prolonged exposure or the harm, though caused earlier, did not manifest itself until later. A time limitation has a great deal to recommend it. It is recognition of the fact that the legal system is not graceful at righting old wrongs. Memories fade, witnesses die, papers get shredded, and firms go bankrupt. However, the reason for limiting the reach of the time limitation to capital goods as defined is not clear. For example, motor vehicles are explicitly excluded, but any argument that applies to a drill press ought to apply equally well to a truck or car. By the same token the time limitation would apply to a bandsaw in a professional woodworkers's shop, but not to one in an amateur's shop.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THEREOF

Question. You have suggested that the interests and welfare of consumers at large is not synonymous with the interests of plaintiffs and plaintiffs' attorneys. Can you elaborate? Please provide an example.

Answer. Virtually all product liability plaintiffs are consumers, and virtually all product liability defendants are corporations. In any given product liability case the plaintiff will be a consumer and the plaintiff will be a corporation. As a result, it is tempting to think that plaintiff's interests and consumers' interests are the same. They are not. Nor are consumers' interests identical with defendants interests. The consumers' interest in product liability law is, first, in making certain that correct incentives are sent to all parties to take the appropriate precautions and, second, that the cost of operating the system is low. Putting aside for a moment the impact on the cost of the system and the effect on incentives, for consumers, an increase in judgments for plaintiffs is merely a payment from one pocket to another. It improves the potential benefits if and when one has the misfortune to be a plaintiff, but at the same time the judgment is an increase in costs which consumers can expect to bear.

To illustrate the point, perhaps a hypothetical example can help. Assume there are ten thousand football helmets sold competitively each year in the school and college market, and regularly each year there are judgments of one hundred fifty thousand dollars, plus defense costs of fifty thousand dollars for a total cost of two hundred thousand dollars. Furthermore, assume that on the plaintiffs' side there are legal and other costs of the process of fifty thousand dollars, leaving one hundred thousand dollars distributed among successful plaintiffs. Now assume that over a brief period of time the law changes in favor of plaintiffs so that each prevailing plaintiff gets twice as much as before the legal change. This is a great victory for plaintiffs. It is also a great victory for attorneys on both sides.

In the example, all the numbers double, all the while holding constant the number of helmets sold. Certainly the price in the helmet market must reflect these added legal costs. The cost of a helmet will be twenty dollars per helmet higher than it would be if there were no change in the law.

From the point of view of helmet producers, their costs have gone up by twenty dollars a helmet and their price has also gone up by twenty dollars a helmet, so they are not harmed except for any costs of transition from one set of rules to the other that did not get accurately predicted and passed on.

From the consumer's point of view the result of the legal change is twofold. First, each consumer must spend twenty dollars more on a helmet. Second, if the player is injured and if he sues and prevails, he will win, on average, twice as much as before. The expected value of that benefit is ten dollars. So the consumer is paying twenty dollars for an expected gain of ten dollars. Consumers as a class bear all the costs of the legal changes, but they must share the benefits with the attorneys on both sides. Thus what is a clear victory for plaintiffs is definitely not a clear victory

for consumers. There must be some very particular problems in the situation of the parties in general for it to be in consumers' interest to be required to pay twenty dollars for ten dollars worth of benefits.

Question. Can you elaborate on your comment that "negligence-based rules can be expected to provide better incentives for precautions than rules based on strict liability"? Are there likely to be fewer total accidents under a negligence-based system?

Answer. The best way to answer this question would be to point to large amounts of solid empirical evidence that would dispose of the question one way or another. Unfortunately the evidence that would dispose of the question has not been assembled. Therefore we have to resort to theoretical rather than empirical reasoning.

Under a negligence-based rule, the manufacturer will pay damages for all accidents where he has been negligent, where he has not met the standard of care determined by the court. Under strict liability, the defendant will pay damages for all those accidents plus all accidents where he was not negligent. The difference between the two rules is who pays for accidents where he was not negligent. Such a difference does not increase the incentive for the manufacturer to be non-negligent, which after all is the incentive that the system is striving for. As a result of reduced incentives from the rule of strict liability, the potential plaintiff may decide to reduce his precautions. This reduction in precautions would lead to more accidents. If that were to happen, manufacturers' costs would increase and they would have an incentive to offset the reduction in precautions, but you could not expect them to fully offset the reduction in precautions.

It is possible to construct examples, very special cases, where the switch to strict liability will increase precautions, but the cases require special assumptions, assumptions about asymmetric information or monopoly in some markets but not others. These are hardly the examples on which one should base the most broad-based legal rules.

To sum up, theoretical reasoning suggests that there would be fewer accidents under a negligence-based rule than under a rule of strict liability. Facile theorists can create some counter examples, but they are very special cases that are not sufficiently weighty to support broad-based legal rules. Substantial empirical evidence on the issue simply is not available.

Senator KASTEN. Mr. Brown, thank you very much.

The next witness is Mr. Martin Connor, representing the National Association of Manufacturers. Mr. Connor.

Mr. CONNOR. Thank you, Mr. Chairman.

I am here today to testify on behalf of NAM and the 158,000 large and small businesses affiliated with it who strongly support S. 44.

The people who oppose S. 44 generally do not criticize its specific provisions. They make two kinds of arguments. Almost always they will say that product liability should be left to the courts, and sometimes they will say that if there is to be product liability legislation, it should be State legislation.

Critics of S. 44 sometimes talk as though it tampers with a long-standing set of rules. That is simply not so. Product liability law, as we understand it today, a distinct set of rules governing the liability of manufacturers and sellers for harm caused by their products, is a creation of the past 20 years. It burst on the scene in 1963 with Justice Traynor's decision in the *Greenman* case. That case was a startling departure from a legal tradition in which the liability of product manufacturers and sellers was determined by principles common to all tort law. When I went to law school in the late fifties, the words "product liability" did not appear in any of our textbooks.

True to its origins, product liability law over the intervening 20 years has not been the product of what we hear described as a common law process. Its rules have not been developed incremen-

tally and predictably from analysis of judicial precedent drawn from cases of similar factual content.

In fact, it would be hard to find a more wholesale abandonment of the principle of *stare decisis* than has happened in product liability law. What we have seen time and time again in one State after another has been abrupt change of direction and departure from precedent. The result has been an extraordinary instability of rules and unpredictability of outcomes, the very opposite of what a common law system would have given us. In my written testimony, I have tried to illustrate this point by listing a fair number of these decisions.

What the courts have really been doing is making major changes in broad social and economic policy. They have been converting traditional tort law based on reparation for fault and deterrence of negligence into something approximating a social insurance system for compensating victims of product-related injuries.

They have done it badly, because they are not equipped for the task. In resolving disputes between individual litigants, courts do not have access to the data or expert advice which would be needed, for example, to assess the product safety impact of any basic change in product liability rules. Mr. Brown has just addressed this issue.

The courts cannot measure the cost effectiveness of the alternative policies which are before them, or undertake cost benefit analysis of any particular policy option, and so they have disregarded costs and given us an incredibly expensive system which appears to pay more to lawyers, both plaintiff's lawyers and defense lawyers, than it does to claimants.

The evidence seems clear that case-by-case adjudication of disputes between individual litigants has not been a particularly sensible way to develop a national policy on product injury compensation. That is a subject for legislation, and it should be Federal legislation. There is urgent need for consistency and stability of product liability rules.

In my written statement, I give many, many examples of the great diversity of product liability rules among the various States. There is no realistic prospect that this problem will be solved by State legislation.

In my prepared statement, I quote from the veto messages of Governor Carlin of Kansas and the late Gov. Ella Grasso of Connecticut, who both realized the futility of a single State attempting to solve a national problem.

In a speech he gave just about a year ago, Congressman Henry Waxman summed it up this way. "In attempting to ameliorate the problem," he said, "State legislatures have actually exacerbated it." He went on to say, "A balanced Federal uniform product liability law is needed."

Thank you for the opportunity to testify this morning, Mr. Chairman. I would be happy to answer any questions.

[The statement follows:]

STATEMENT OF MARTIN F. CONNOR, GENERAL ELECTRIC CO., ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman and members of the subcommittee. My name is Martin F. Connor. I am testifying today as a member of the National Association of Manufacturers' Loss Prevention and Control Committee and as co-chairman of its Product Liability subcommittee. I am Washington Corporate Counsel for General Electric Company. For many years prior to my current assignment I was senior counsel for General Electric industrial product and system businesses with responsibilities which included product liability counseling and litigation management.

The National Association of Manufacturers is an association of small and large manufacturers. NAM represents approximately 12,000 member companies, 80 percent of which are small businesses. NAM members produce approximately 75 percent of the nation's industrial output. NAM is also affiliated with an additional 158,000 businesses through its Associations Department and the National Industrial Council.

NAM strongly supports enactment of S. 44. I do not propose today to deal with the specific contents of this bill. What I would like to discuss is the appropriateness of federal legislation on this important subject. The fact is, of course, that there has been very little public criticism of specific provisions of S. 44. S. 44, after all, is the product of a very long, conscientious effort to identify and accommodate the points of view of all parties in interest. Those who oppose the bill, such as the American Trial Lawyers Association, have argued for the most part that enactment of any legislation, regardless of its content, would be inappropriate. That is the issue I would like to address.

Opponents of S. 44 have generally raised two questions with respect to federal product liability legislation. The first question is whether product liability should be controlled by legislation or should be left to the courts. I would like to emphasize that I consider this the threshold question. Those who oppose federal product liability legislation have, with very few exceptions, also opposed state legislation. The second, and I believe quite secondary, question is whether product liability legislation, if there is to be such, should be state or federal.

Let me acknowledge at the outset, that as I review the record of the hearings held in the last Congress on S. 2631, the predecessor to S. 44, and as I read the statements of those who testified in the April 6, 1983, hearing on S. 44, it is clear that almost everything which could be said for or against this bill has been said. Absent some new and unexpected body of empirical evidence on its subject-matter, it would be difficult to add anything of substance to the argument. I propose, therefore, simply to reflect on two themes which have run through the discussion: first, that product liability law has evolved in common-law processes and is best left to judges not legislators; second, that the substance of their product-liability laws should in any case be left to the preferences of the individual states.

I. THE CASE FOR LEGISLATION

First, should the principles of product liability law be left to the courts or are they an appropriate and timely subject for legislative attention?

Before answering this question, it would be well to recall that product liability law as we understand it today, a distinct set of rules governing the liability of manufacturers and sellers for harm caused by their products, is a creation of the past twenty years. Critics of S. 44 sometimes talk as though it tampers with a centuries-old set of rules. That is simply not so.

Product liability, as we know it, first appeared in 1963 with the decision of the Supreme Court of California in *Greeman v. Yuba Products, Inc.*, 54 Cal. 2d 57, 377 P. 2d 897. This case was an abrupt and radical departure from a legal tradition in which the liability of product manufacturers and sellers was determined by principles common to all tort law. It is very instructive to note that Justice Roger Traynor, the author of the *Greenman* decision and the father of product liability law, was well aware that he was not acting in a traditional judicial role. He wrote extensively about his *modus operandi*. He believed that appellate judges should take the initiative in seeking out what he called "environmental data" on which to ground "dramatic leaps forward." Such data, rather than "the selected litigated facts presented to the court" would enable judges to "detect latent quackery in science or medicine, to edit the warm spore of social scientists, to add grains of salt to the fortune-telling statistics of economists." This procedure was appropriate in his view because he understood "judicial responsibility" to mean "the recurring choice of one policy over another in . . . the formulation of new rules." Traynor, "No Magic

Words Could Do It Justice," 49 Calif. L. Rev. 615, 617-19 (1961), "Reasoning in a Circle of Law," 56 Va. L. Rev. 739, 747-49 (1970).

That was the spirit in which the courts first came to product liability law and it is the spirit in which they have continued to address it. Product liability law, over these twenty years, has not been the product of a common-law process of adjudication. Its rules have not been developed incrementally and predictably from analysis of judicial precedent drawn from cases of similar factual content. What we have seen instead, time and again and in one state after another, has been abrupt change of direction and radical departure from precedent, one example after another of Traynor's "dramatic leaps forward." The result has been an extraordinary instability of rules and unpredictability of outcome: the very opposite of what a common-law system is meant to provide.

Illustrations of these "dramatic leaps forward," these total discontinuities in the development of product liability law, are abundant. Let me point out just a few of them.

Larsen v. General Motors Corp., 391 F. 2d 495 (8th Cir. 1968) introduced us to the notion of "crashworthiness." The 8th Circuit told us that a manufacturer is strictly liable for enhancement of a claimant's injuries even if the accident was caused by a party totally unrelated to the manufacturer.

Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d 443, 266 N.E. 2d 897 (1970), struck the term "state of the art" from our vocabulary. The Supreme Court of Illinois rejected a hospital's defense that medical technology provided no means by which it could detect a hepatitis virus in human blood. (We were also surprised to learn that product liability rules apply to blood transfusions performed in hospitals.)

In 1964 Justice Traynor succeeded in having his doctrine of strict liability in tort incorporated into the Restatement of Torts (Second) as Sec. 402A. By 1972 a large number of states had accepted the Restatement's version of strict liability. In *Cronin v. J. B. Z. Olsen Corp.*, California rejected the Restatement's formulation, reaffirmed Greenman and introduced a division among the states which persists to this day.

Ault v. International Harvester Co., 13 Cal. 113, 528 P.2d 1148 (1974), and later *Capara v. Chrysler Corp.*, 52 NY 2d 114, 436 NY Supp. 2d (1981), rejected the long-established common-law principle barring admission of evidence of a manufacturer's post-accident design changes.

Moran v. Faberge, 273 Md. 538, 332 A.2d 11 (1975) held that a manufacturer is strictly liable for failure to warn of reasonably foreseeable uses of his product. A reasonably foreseeable use of cologne, according to this notorious case, was pouring it on a burning candle!

Ray v. Alad, 19 Cal. 3d 16, 560 P.2d (1977) created a new exception to the general common-law rule that a purchaser does not assume the seller's liabilities, by holding a successor corporation strictly liable for product liability claims against its predecessor. Only a year earlier the Supreme Court of Michigan had invented the "continuity of enterprise" test in which it attempted to save the common-law rule by asking whether the successor was in fact a continuation of its predecessor. *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W. 2d 873 (1976).

Shepard v. Superior Court, 76 Cal. App. 3d 16 (1978) extended the doctrine of strict liability by permitting recovery of damages for mental anguish where there was no physical injury. The claimant alleged emotional trauma from witnessing an automobile accident.

In 1978 the Supreme Court of California, for the third time in fifteen years, reexamined and restated the test for determining whether a manufacturer is strictly liable for defects in his products. *Barker v. Lull Engineering*, 20 Cal. 3d 413, 573 P.2d 443 (1978). A manufacturer is now strictly liable, at least in California, if the claimant establishes that a product was the proximate cause of his injury and the manufacturer fails to prove that the benefits of the product's design outweigh its risks. Thus, in a radical reversal of precedent, the manufacturer may have the burden of proving that his product is not defective.

Later in 1978 the Supreme Court of California abolished contributory negligence and assumption of risk as defenses in product liability cases and, in their stead, legislated principles of comparative negligence. *Daley v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162 (1978).

New Jersey revisited the strict liability test in 1978 and approved this standard: a product is defective if it is so likely to be harmful that a reasonably prudent manufacturer who had actual knowledge of its harmful character would not have placed it in the market. *Cepeda v. Cumberland Engineering Co., Inc.*, 76 NJ 152, 386 A. 2d 816 (1978). Manufacturers in New Jersey are now strictly liable for risks which are

totally unforeseeable. What this means in real life is that they are liable for risks against which they could not, by definition, be expected to have insured.

Bichler v. Eli Lilly, 79 App. Div. 2d 317, 436 NYS 2d 265 (1980) introduced us to the "enterprise theory of liability." The court held that where it was impossible to identify the specific manufacturer of the generically manufactured product which caused plaintiff's harm, all leading manufacturers were jointly and severally liable since they engaged in consciously parallel conduct in obtaining an FDA drug permit and in failing to provide plaintiff with adequate warnings. Another dramatic leap forward!

Late in 1980 the Supreme Court of California visited the same set of facts and devised a "market share theory of liability." Each manufacturer would be held liable for that proportion of the judgment corresponding to his share of the market in the product unless he could show that he could not have manufactured the specific product which caused plaintiff's injuries. *Sindell v. Abbott Laboratories*, 16 Cal. 3d 588, 607 P.2d 924 (1980).

Recovery for economic loss in the absence of personal injury or property damage was permitted in a product liability action in 1980 in *Hardly Coal Co. v. International Harvester Co.*, 494 F. Supp. 249 (N.D. Ill. 1980). Within a year, both the Third Circuit and the Minnesota Supreme Court disagreed. *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.* 626 F.2d 280 (3d Cir. 1980); *Superwood Corp. v. Siempelkaump Corp.*, 311 N.W. 2d 159 (Minn. 1981).

Pennsylvania Glass and Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3rd Cir. 1981) held that a product liability action should be permitted where the only damage has been to the defective product itself. This departure from all that went before seems now to be the law of six states.

Just last year, the Supreme Court of New Jersey cut all connections with the past by imposing strict liability for failure to warn of risks associated with a product irrespective of whether those risks were scientifically discoverable, and therefore knowable, at the time of the failure. *Beshada v. Johns-Manville Prods. Corp.*, 90 NJ 191, 447 A.2d 539 (1982).

I want to emphasize that this has not been a scientific survey of leading product liability cases. I have just taken a random walk through a few cases which come to mind. The simple point which I have tried to make by these illustrations is that those who argue, often in the most romantic terms, for continuance of historic common-law adjudication of product liability claims could not possibly demonstrate that this is what has been happening in the courts over the past twenty years.

What the courts have been doing, as Justice Traynor well knew, is making major changes in broad social and economic policy. They have been converting traditional tort law, based on reparation for fault and deterrence of negligence or other culpable conduct, into something approximating a social-insurance system for compensating victims of product-related injuries. They have done it badly because they are not equipped to undertake a task of this sort. In resolving disputes between individual litigants, the courts do not have access to the data or expert advice which would enable them to determine the economic impact of any basic redirection of product liability rules. They are unable to measure the cost effectiveness of the alternative policies which are before them or to undertake cost/benefit analysis of any particular policy option. They have, therefore, disregarded costs, with disastrous consequences to the public whose interests they have been attempting to serve.

There is ample evidence in the record of hearings on S. 2631 (97th Congress) and S. 44 of the adverse economic impact which this judicial excursion into policymaking has had on business productivity and innovation. The product liability system is financed by a very heavy "tax" on American business. There is probably insufficient evidence in the hearing record of the inequity and inefficiency with which these "tax dollars" are distributed to beneficiaries. The point I would make, however, is that this elaborate and costly program has been developed and implemented by judges without public comment or debate on its larger social and economic dimensions. The case-by-case adjudication of disputes between individual litigants is not a suitable process for rational development of a national policy on product-injury compensation. This is a subject for the legislature.

II. THE CASE FOR FEDERAL LEGISLATION

If there is need for legislative attention to the product-liability system, should it be by way of federal legislation? The answer, again, is yes. There is urgent need for consistency and stability of product liability rules. There is no prospect that they will be provided by uniform state legislation.

The need for uniformity and stability of product liability law was demonstrated many times in last year's hearings on S. 2631 and in the hearings held so far this year on S. 44. Nor is it a matter of partisan controversy. The case was most excellently stated, for example, by Congressman Henry A. Waxman in an address given on April 20, 1982.

"[A] balanced federal uniform product liability law is needed. The current patchwork of fifty different states' laws on product liability causes confusion, conflict, and unnecessary costs for everyone involved. The interstate character of the manufacture and distribution of products necessitates a clear, uniform law. Unfortunately, the courts have not given consistent interpretation to some of the most fundamental principles of product liability. In attempting to ameliorate the problem, many state legislatures have actually exacerbated it. Thirty-one states have passed product liability measures, but they do not address this area in a consistent, comprehensive and balanced fashion. I believe that product liability legislation can be fashioned that addresses the troublesome areas of product liability law, by clearly and fairly setting forth the responsibilities of manufacturers, sellers and consumers. Such a clear and uniform statement of product liability law would reduce the uncertainty, complexity, and unnecessary costs associated with the current system."

Those who design, manufacture and market products have a right and a need to know the standards by which society will hold them accountable for the safety of their products. Moreover, they have a right and a need to know that those standards, all things being equal, will not change while the product is in use. Today they know neither of these things. When they look to the law of the fifty states and the District of Columbia, they find fifty-one sets of rules which differ widely in content and clarity and are constantly changing.

Opponents of S. 44 attempt at times to minimize this point, but it is quite valid. In the April 6, 1983, hearings on this bill, for example, a spokesman for the West Virginia Trial Lawyers Association contended that the test for establishing strict liability in tort is the same wherever he goes. His experience is difficult to explain since there are, in fact, a number of quite different theories of strict tort liability applied by the various states. Alaska, California, Colorado and New York, for example, adhere to the *Greenman* test: A manufacturer is strictly liable when an article he places in the market, knowing that it is to be used without inspections for defects, proves to have a defect that causes an injury to a human being. Thirty-five states accept, with minor variations, the rule of the Restatement of Torts (Second) § 402A: One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to this property . . . Six of these states have explicitly permitted juries to use Professor Keaton's "balancing test" to decide liability. Two others permit the test to be used as a factor in reaching a decision. Three states seem to vacillate somewhere between *Greenman* and the Restatement: Delaware, Ohio, and Pennsylvania. Four states, Alabama, Michigan, New Jersey and West Virginia, have articulated their own standards of strict liability which seem to include elements of negligence. (Michigan calls its cause of action one in "implied warranty of fitness.") In five states and the District of Columbia, strict tort liability has not been adopted. Georgia, for example, imposes "strict warranty liability" by statute. Liability is imposed only if the product is not merchantable and reasonably suited to its intended use. For the manufacturer and seller of products, all this diversity and confusion translates into one thing: transaction cost.

In concentrating on the different standards of liability, however, it is easy to forget that this is only the tip of the iceberg. There is an enormous diversity of other rules of product liability law. It might be helpful to review some of them so that we have some sense of what a business faces. For example:

All states, of course, give users and consumers of products a cause of action. Sixteen states, however, also allow any injured bystander (i.e., one who is not a user or consumer and is not in the chain of product distribution) to bring a product liability action. Six other states permit a foreseeable bystander to bring such an action.

Most states permit injured employees to pursue both workers' compensation and product liability remedies. Idaho, Indiana and Mississippi do not. In those states workers' compensation is the employee's exclusive remedy.

There is great diversity among the states in defining "manufacturer" and "seller" and in determining, therefore, who is potentially liable. Three states, for example, permit a product liability action against a provider of services. Twenty-three states have permitted such actions against product lessors. Sixteen states have permitted them against building contractors and developers. Two states have permitted actions against sellers of sealed packages; the eight other states which have dealt with the issue do not. Two states do not permit product liability action against wholesal-

ers or distributors. Seven states have had to decide whether a product liability action will lie against a successor corporation; five have said yes, two no.

In six states a product liability action will lie where the only injury was to the defective product itself. The five other states which have faced the issue hold that it will not. Eighteen states have had to decide whether a product liability action will lie where the only injury is loss of profits unaccompanied by physical injury or property damage. Six say it will; twelve say it will not.

Fifteen states permit some sort of "state of the art" defense. The rest do not. Thirty-three states have permitted a "misuse" defense to a strict liability action. The rest do not.

Seventeen states use the principle of *res ipsa loquitur* to ease plaintiff's burden in meeting the "unreasonably dangerous" requirement of § 402A. The seven other states which have considered the question have held to the contrary.

Two states, California and New York, permit evidence of post-accident remedial measures. All others adhere to the contrary common-law rule.

Most states permit the award of punitive damages in product liability actions but four states, Louisiana, Massachusetts, Nebraska and Washington, do not. Connecticut limits punitive damages to twice the amount of compensatory damages.

Finally, there is great diversity among the states on the availability, in a product-liability action, of the defenses of contributory negligence and assumption of risk and on the applicability of principles of comparative fault.

Let me emphasize again that this is not a scientific survey of points of difference among the states. It has just been another random walk, using readily available data. These examples, make the point, however, that there is an extraordinary diversity among the product liability laws of the various states. Mr. Waxman was not exaggerating when he described it as a "patchwork" causing "confusion, conflict and unnecessary costs."

The problem which this diversity presents to manufacturers, of course, is that they do not design products for fifty-one markets. They do not sell in local markets; they sell in national and international markets. On average, about 70 percent of the goods manufactured in a state will be sold to out-of-state users. Neither do these firms buy product-liability insurance on the basis of experience in a local or state market, as is the case with automobile and malpractice insurance. Their product-liability insurance premiums are determined on the basis of nationwide experience.

There is pressing need for nationwide uniformity and reasonable stability of product liability rules so that (1) manufacturers and sellers may understand their obligations, (2) consumers may understand their rights, (3) insurers may calculate rates on a rational basis, without today's guesswork and panicky hedging, and (4) above all, and as a consequence of the first three points, transaction cost maybe removed from the system and a larger part of the premium dollar may be delivered to victims of product-related injuries.

The experience of recent years demonstrates clearly, however, that the states will not enact uniform product liability legislation. Following publication of the Uniform Product Liability Act in 1979, there was widespread euphoria that the problems I have just described would be corrected by its enactment in the states. And, in fact, product liability reform statutes have been enacted, in one form or another, in about thirty states. The further fact, however, is that no two of these statutes are alike and most of them fail to address the principal issues which arise in product liability cases. If anything, there is less uniformity today than there was in 1979! The net result is that we can say today with a high degree of confidence that the state legislatures will not give us the uniform, stable product liability rules which manufacturers, sellers and users of products desperately need and deserve.

The state legislatures are not to be blamed for this failure. There is simply no reason to expect any state to solve what is in fact the problem of a national market. A majority of the products manufactured in every state are ultimately used in another state. A majority of the products used in every state were manufactured in other states. How can any state legislature fairly and effectively balance and advance the interests of the manufacturers, merchants and consumers of that one state? It cannot and will not be done.

This is not a theoretical argument. In vetoing a state product liability bill on April 24, 1980, Governor John Carlin of Kansas said:

"Current economic data indicate that approximately 90 percent of the products manufactured in Kansas are purchased out-of-state and a similar percentage of goods used in Kansas are manufactured in other areas. Consequently, unless a law is passed on the Federal level, . . . only a small number of Kansas business owners could benefit from the special protections contained in the bill. Yet, all Kansas consumers would be subject to the limitations for recovery."

In June 1978 Governor Ella Grasso of Connecticut had made a similar observation in vetoing a similar bill.

Put simply, product liability is a national problem. Our present system of product liability rules is a most appropriate subject for federal legislative attention.

It is sometimes argued that consideration of "states' rights" bars a federal solution to the product liability problem. My remarks this morning have, I believe, already disposed of this contention. The rules of product liability govern products sold in a national market and insured in a national market. Congress is being asked only to do what the Founders intended it to do, to "regulate Commerce . . . among the several States." Any lingering doubts on this score should be dispelled by the fact that the Reagan Administration, no champion of federal intervention, has supported the concept of federal product liability legislation.

Thank you for the opportunity to testify this morning. I would be happy to answer any questions.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Opponents of Federal legislation assert that it will not achieve uniformity. In fact, they argue that S. 44 uses new concepts which will result in years of confusion and that the various courts will interpret the statutory language differently. What are your thoughts?

Answer. NAM's April 27, 1983, testimony on S. 44 gave many, many illustrations of the extreme diversity which exists today among the product liability laws of the various states. In the face of this deplorable situation, it is difficult to understand how opponents of the bill are able seriously to argue that "it will not achieve uniformity." If there is anything that S. 44's enactment would clearly do, it would be to replace today's chaos with a consistent set of product-liability rules.

It is to be expected, of course, that courts would on occasion interpret provisions of the bill in somewhat different ways. S. 44 "will not achieve uniformity" in that absolute sense. But there has probably never been a complex Congressional enactment on which courts did not differ in some respect! Courts are staffed by men, not computers. Judicial disagreement about the meaning of statutes is part of life.

The important point to be made in response to this objection, however, is that S. 44 does not deal in novel or untried concepts. Its terms are already the common currency of product liability law. More than that, its rules, as the Committee Report on S. 2631, 97th Congress, so meticulously documented, are already, for the most part, the law of a majority or substantial minority of the states. The courts will not be interpreting a statute which has been cut from whole cloth. They will not be confronted with strange terms or unfamiliar principles. If there are problems of judicial disagreement, they will be few, short-lived and inconsequential in comparison with today's problems.

Question. Some argue that where there is both an innocent victim and an innocent manufacturer, the manufacturer should pay. Do you agree?

Answer. This question highlights the basic contradiction which characterizes our product liability system. Is it a tort system or an accident insurance program?

The law of torts was intended, historically, to deter wrongful conduct by requiring that one who wrongfully injured another make reparation. In the context of harms caused by products, the law had two goals: to make amends for wrongdoing and to maximize product safety. They were opposite sides of the same coin.

Over the past twenty years product-liability law has assumed a new and very different goal: the compensation of anyone harmed by a product. The emphasis first shifted from the quality of the manufacturer's conduct to the quality of his product. A person injured by a "defective product unreasonably dangerous" was to be compensated. More and more, however, the trend has been to abandon or ignore the "unreasonably dangerous" requirement and to regard a product as defective if it has demonstrated a capacity to harm someone. The explicit rationale which has driven this development is the proposition stated in the Committee's question: as between an innocent victim and an innocent manufacturer, the manufacturer should bear the cost of a product injury since he can spread it over all purchases of his products. The magic words are "risk distribution."

I see at least two major problems with this development, one with the theory and the other with its implementation.

First, strict liability motivated by consideration of risk distribution minimizes or destroys incentives to product safety. (This would not be true in connection with

conventional manufacturing effects, i.e., failure to conform to one's own product specifications, which has always appeared to me to be case of negligence per se. It is certainly true of design and warning cases.) This point was well made in the testimony of Mr. John Brown at the April 27, 1983, hearing.

Second, this approach introduces enormous confusion and inequity since it attempts to use a reparation system to achieve compensation goals. I developed this point fully in my testimony before this Committee on June 30, 1982. Product Liability Reform Hearings on S. 2631 Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science and Transportation, Serial No. 97-109, 97th Congress, 2d Session, 199, 204-05 (1982). "The result," as I said then, "is that a few claimants receive enormous windfalls, transaction costs exceed recoveries, insurance costs escalate, the viability of small business is threatened, entrepreneurship becomes a game of chance."

Question. Opponents of S. 44 suggest that the bill is a foot in the door for Federal legislation in all areas of tort law. Do you agree with this statement?

Answer. I do not agree.

S. 44 addresses a unique problem of interstate commerce. Most of the products manufactured in any state are purchased and used elsewhere. Most of the products used in a state were manufactured elsewhere. For this very good reason, product liability insurance rates are set nationally and uniform standards of liability should prevail nationally.

None of these considerations are relevant to other areas of tort law, to an assault and battery, for example, or to a defamation, an act of medical malpractice or the negligent operation of a motor vehicle. These are local events with no significant interstate ramifications. Insurance premiums are set on a local basis. They are matters for local law.

There is no reason to believe that S. 44 is "a foot in the door for Federal legislation in all areas of tort law." To claim otherwise is simply to use a scare tactic.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. (a) If national uniformity is the principal reason for a federal product liability law, would you support federal enactment of the Restatement of Torts, Section 402A, which is already law in about two-thirds of the states? (Restatement of Torts 2d, Section 402A provides a strict liability standard.)

(b) If uniformity is so important, do you believe we should adopt a federal uniform law for the whole worker compensation system?

Answer. (a) Section 402A amended and codified the rule of *Greenman v. Yuba Power Products* which dealt with a defect in the manufacture of a product. It was an appropriate rule in that context and S. 44 would preserve Section 402A's underlying principle of strict liability for such defects. Section 402A does not provide a suitable rule for resolution of design and warning cases and the attempts of the court to apply it to those cases have resulted in the incredible lack of uniformity which we described in our April 27 testimony. Federal enactment of 402A as a standard for design and warning cases would contribute nothing to national uniformity.

(b) Workplace accidents are local events. There is no more reason to nationalize worker compensation than there is to nationalize the law of trespass. Of course, when a workplace accident involves a product, we find ourselves involved both with worker compensation and with product liability. S. 44 admirably harmonizes these two systems. But the considerations which mandate a federal solution to the problems of the product liability system have no relevance whatsoever to worker compensation.

Question. Will federal product liability legislation "straightjacket" the law?

If S. 44 is enacted, do you propose that every time it becomes clear that the law is unbalanced in a specific case, manufacturers or plaintiffs come to the Congress to amend the law?

Answer. There would, of course, be no way to stop an aggrieved plaintiff or defendant from coming to Congress and asking that the law be changed. Every citizen has a right, under the Constitution, to petition the Congress. The history of S. 44 suggests, however, that it is far less likely to occur here than in the case of most Congressional enactments.

Very few bills have been introduced in the Senate of the United States after as much study, public comment and public discussion as has preceded the introduction of S. 44. The roots of this bill reach back at least as far as the White House Conference on Product Liability convened by President Ford in March 1976 and to the very comprehensive research and voluminous 1977 report of the federal Interagency

Task Force on Product Liability. On the basis of that report, a Department of Commerce Task Force on Product Liability and Accident Compensation Issues published in the Federal Register for April 6, 1978, a comprehensive Options Paper for public comment. As a result of public reaction to that paper, the Department of Commerce prepared and published for comment in the Federal Register of January 12, 1979, a first draft of a Model Product Liability Act. That draft was extensively revised as a result of the comments received and was published in the Federal Register of October 31, 1979 as the Uniform Product Liability Act.

The Uniform Product Liability Act then served as the basis for a bill, H.R. 7000, introduced in the 96th Congress, on April 1, 1980, by Congressman Richardson Preyer. Hearings were held in April 1980 and on the basis of information received in those hearings a revised bill, H.R. 7981, was introduced by Mr. Preyer on August 1, 1980.

On October 15, 1981, the staff of the Senate Committee on Commerce, Science and Transportation prepared and circulated for public comment a Working Draft of a bill which was based substantially on H.R. 7921. Thousands of pages of commentary were submitted by interested parties of every persuasion. After analysis and assessment of these comments, the Committee staff prepared a Staff Working Draft No. 2 which was again circulated for public comment on March 1, 1982 and which was again the subject of considerable public response. Thereafter Working Drafts Nos. 3 and 4 were prepared and circulated within the legislative branches in a continuing effort to achieve consensus on this important issue.

Finally, S. 2631 was introduced. Hearings were held on March 9 and 12 and June 30 and July 1, 1982. On October 1, 1982, this Committee S. 2631, substantially amended in response to the hearing record, and ordered it favorably reported by voice vote. The same bill has now been reintroduced in the 98th Congress as S. 44 and hearings were held on April 26 and 27, 1983.

The point I would make by this narrative is that the Committee has a bill before it growing out of a public record which must have few peers for its breadth and depth. In the course of its evolution competing interests have been heard and weighed. The result is an exceptionally thoughtful and balanced legislative proposal. It is difficult to imagine that Congress will be overwhelmed with petitions for its amendment. It is even more difficult to imagine that Congress, having deliberated so long and so thoroughly, would feel compelled to heed many such petitions.

Senator KASTEN. Mr. Connor, thank you very much.

I would like to thank all of the members on the panel. In the interest of time, I am going to change around the order, because Mr. Larry Gold, the chief counsel of the AFL-CIO, speaking on behalf of a number of labor unions, evidently has an airplane he is trying to catch. We also have about eight more witnesses appearing after this. So, we will be submitting questions to this panel, as to other witnesses, in writing. We would hope very much that you could get back to us. I very much appreciate the efforts of all of you, and thank you for appearing here today.

The next witness is Mr. Larry Gold, chief counsel of the AFL-CIO. Mr. Gold, thank you for appearing here today. It is my understanding that you are appearing here not only on behalf of the AFL-CIO, but that your testimony also should be interpreted by the committee as testimony on behalf of the Steel Workers and the UAW as well.

We welcome you. We thank you very much for your participation here.

I would also like to say to the members of the committee that Mr. Gold is appearing at the request of Senator Hollings, and we are very pleased to have you here with us today.

STATEMENT OF LARRY GOLD, CHIEF COUNSEL, AFL-CIO

Mr. GOLD. Thank you, Senator.

As you stated, this testimony is on behalf of the AFL-CIO and of its major affiliated unions, the UAW and the Steel Workers. We

appreciate this opportunity to testify before you, particularly since we come here not to praise but rather to criticize S. 44.

We oppose enactment of S. 44 because its organizing principle so far as we can tell is to select from current State product liability tort law, where there is a split of authority between State and Federal law, it appears that the legal rule is protective of the defendant, and that that rule becomes Federal law, preempting State law. We are against the bill, in other words, because we believe the proposed legislation is contrary to the interest of the workers we represent.

In that connection, I wish to stress that we do not support the status quo or States rights or the efficacy of litigation to solve this social problem. To take up Mr. Bender's invitation, we would be happy to work with you for a Federal worker's compensation law.

Having said that, we do find it an irony that S. 44's mechanism for protecting producers and sellers is a Federal statute preempting a body of State law continuously recognized throughout our history as being at the very center of the State's authority and responsibility.

Our experience is that whenever efforts are made to enact Federal law that would ameliorate the condition of workers, consumers, the poor, or the oppressed, the supporters of S. 44 oppose the legislation on federalism grounds—that the best law is the law made by those closest to the people, and that a diversity of approaches, each adapted to local needs and mores, is superior to a single Federal dictate.

We are surprised that the corporate interests supporting S. 44 do not even acknowledge these verities, much less give them any weight in this instance. We are certain that their conversion is a permanent one, and that we will be working with them hand in hand on many matters in the future.

There are three specific aspects of the bill that I wish to note in concluding my remarks.

First, section 5(b)(1) states that a product is not unreasonably dangerous in design or formulation unless the manufacturer knew or should have known of the danger and there was a technologically feasible means of eliminating the danger.

This represents a substantial change from current law as we understand the law. Presently there is no need to prove actual or constructive knowledge of the defect in the formulation of a product. A manufacturer is liable for all defects, whether or not discoverable, as long as the defects make the product unreasonably dangerous. If the object is to reduce cost by discouraging law suits, S. 44 succeeds, but to the detriment of the product user.

Second, section 6, Product Warnings and Instructions, eliminates all strict liability concepts with regard to claims alleging a failure to warn and provides for a return to common law negligence theories. Practically speaking, the effect of the restriction on the duty to warn will be to make workers dependent on their employers to relay appropriate warnings as to the potential hazards posed by goods and materials in the work place. On the basis of hard experience and for obvious reasons, we believe the opposite approach to be the correct one.

Third, section 11 would reverse the universal rule allowing a workers' compensation carrier to recover what it has paid in benefits where there is a recovery from a third party tortfeasor. Section 11 would instead allow the tortfeasor to reduce his liability by the total amount of compensation payable by the compensation carrier. While this may reduce the manufacturer's risk of liability, it does little to promote innovation or safety in design. The manufacturer who knows that the burden of paying for defective merchandise can be shifted in many instances to the employer through the latter's workers' compensation coverage has less incentive to produce an item meeting state-of-the-art safety requirements. The net effect from an insurance point of view is to shift losses from an unknown amount to the known levels provided by workers compensation.

Section 11[a] also requires that an injured worker exhaust his or her remedies under the applicable workers compensation law before a product liability suit can be filed. S. 44, in this regard, seems to us to ignore the fact that many compensation cases, for a variety of reasons, take years to reach a final determination. Under the bill, once able to sue, the injured worker would be required to backtrack at great expense through the years to prove the truth of his assertions.

In short, Mr. Chairman, we do not denigrate the power of Congress or the Commerce clause, but on the merits of this proposal we respectfully disagree. Thank you.

Senator KASTEN. Mr. Gold, thank you for your testimony. I know that you have had conversations with members of the staff and also the Chairman of the full committee, Senator Packwood, or at least representatives of the various organizations that you today speak for.

As you may or may not know, there is a good deal of work going on right now dealing with a compromise on the workman's comp section and we still are working out some details of that and would ask for your input. I am not sure that we are always going to agree on every single point in every single area of this bill, but a number of the other comments you made have been comments that others have made and we are anxious and eager to work with you or other representatives of your organizations that you may choose as we kind of struggle through the final sections of this legislation.

Thank you very much for your testimony here today. There may be questions that we will submit to you in writing, and I would hope that you could get back to the committee in a relatively short time.

Mr. GOLD. We will do our best to answer any written questions promptly. We appreciate too the opportunity to work with you and your staff on the merits of this proposal.

We will judge it on the merits, as I know you would want us to do. Thank you.

Senator KASTEN. Thank you for appearing.
[The statement follows:]

STATEMENT OF LAURENCE GOLD, SPECIAL COUNSEL, AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. Chairman, the American Federation of Labor and Congress of Industrial Organizations appreciates this opportunity to state its views on S. 44, the Product Lia-

bility Act, particularly since we come here not to praise, but rather to criticize the proposal.

The AFL-CIO opposes enactment of S. 44 because its organizing principle so far as we can tell is to select from current state product liability tort law where there is a split of authority the legal rule that is protective of the defendant and to make that rule federal law that preempts state law. While such documents as Senate Report 97-670 on S. 2631, 97th Congress, 2nd Session—the Senate Report on the Product Liability Act in the last Congress—assure that each rule so selected is “fair to all parties,” the substance of the bill taken as a whole shows that fair to all parties means fairer to defendants. S. 44, as we read the bill, is another of the efforts that have characterized the Congress recently to take from those who need it most—in this instance individuals harmed by defective products they work with or purchase for a beneficial use—in order to give to those who have the most—the producers and sellers of those products. The tort law’s civilizing functions of protecting those who have suffered harm and of promoting the production of safe and healthful products is all but completely ignored.

We find it an irony—although not a delicious one—that S. 44’s mechanicism for protecting producers and sellers in a federal statute preempting a body of state law continuously recognized throughout our history as being at the very center of the state’s authority and responsibility. Our experience is that whenever efforts are made to enact federal law that would ameliorate the condition of workers, consumers, the poor or the oppressed, the supporters of S. 44 oppose the legislation on federalism grounds viz., that the best law is the law made by those closest to the people and that a diversity of approaches each adapted to local needs and mores is superior to a single federal dicatate. S. 44 does not even acknowledge there verities much less give them any weight.

Given the AFL-CIO’s total opposition to the Product Liability Act we believe there is no need to belabor the obvious and we conclude by merely noting six of what we regard as its most objectionable features:

1. Section 5(b)(1) states that a product is not unreasonably dangerous in design or formulation unless the manufacturers knew or should have known of the danger and there was a technologically feasible means of eliminating the danger. This represents a substantial change from current law. Presently, there is no need to prove actual or constructive knowledge of a defect in the formulation of a product; a manufacturer is liable for all defects, whether or not discoverable, so long as the defects make the product unreasonably dangerous. Under S. 44, a plaintiff apparently would have to prove negligent selection of the component manufacturer, negligent inspection by the assembling manufacturer or sue the component manufacturer, if determinable, and prove that he was negligent. The net effect would be to cut back liability for latent defects. While this may “protect” some manufacturers and reduce their exposure to suit, it does not provide an adequate remedy for the victim who must be willing to endure the protracted search for redress. If the object is to reduce costs by discouraging legitimate lawsuits, S. 44 succeeds—to the detriment of the innocent product user.

2. Section 6, Product Warnings or Instructions, eliminates all strict liability concepts with regard to claims alleging a failure to warn and provides for a return to common law negligence theories. This is true for warnings at the time of manufacture, Section 6(b), as well as post-manufacture warnings, Section 6(c). Section 6(c)(2) also relieves a manufacturer of liability if he made “reasonable efforts” to make postmanufacture warnings. And Section 6(d) would relieve a manufacturer of liability for failure to warn the ultimate user or consumer where the warning was conveyed to an employer or other person who could be expected to convey the information or where it is not feasible to warn the ultimate consumer or user. This exception would not apply if the warning could be affixed to the product itself. Nevertheless, this represents a departure from the general rule that the warning must be given to the ultimate user or consumer. As such, S. 44 would severely limit the viability of a cause of action for failure to warn where the accident arose out of and in the course of the claimant’s employment.

Practically speaking, the effect of a restriction on the duty to warn will be to make workers dependent on their employers to relay appropriate warnings as to the potential hazards of goods and materials in the workplace. Where jobsites are far removed from the employer’s headquarters, it is easy to imagine the sketchy nature of a warning given by field supervisor regarding the use of the many toxic materials now in use. Concomitantly, the level of understanding among the workers may require a more detailed or pointed warning than would be given in the press of a deadline work situation. A large, brightly colored skull and crossbones conveys far

more than words; yet S. 44 all but ends the need for such an obviously simple warning so long as the once removed employer knows of the existence of a danger.

3. Section 8, Responsibility of Product Sellers, requires proof of negligence on the part of a wholesaler or retailer or a breach of an express warranty, unless the manufacturer is judgment proof, or outside the jurisdiction of the forum. In these cases, the seller would be treated as the manufacturer. Again, this is a major departure from the present practice of holding everyone in the chain of distribution strictly liable for a defective product. Many states recognize the principle of strict liability espoused in the Restatement (Second) of Torts, Section 402A based upon the logical principle that the public has the right to expect a safe product. Public policy, especially in today's technological society, demands that the burden of accidental injuries caused by products intended for use or consumption be placed upon those who market them, with the innocent consumer protected to the maximum. While seemingly harsh, this rule protects users of cars which are recalled only after numerous accidents and injuries occur, as well as recipients of medication in hospitals. In either instance, current law allows recovery against the sellers and distributors of those products without requiring a showing that the seller or distributor failed to exercise reasonable care with respect to the product, as Section 8(a)(1)(B) of S. 44 would require. Clearly another roadblock to recovery has been interposed.

4. Section 11 would reverse the universal rule allowing a worker's compensation carrier to recover what it has paid in benefits where there is a recovery from a third party tortfeasor. Section 11 would, instead, allow the tortfeasor to reduce his liability by the total amount of compensation payable by the compensation carrier. While this may reduce the manufacturer's risk of liability, it does little to promote innovation or safety in design. The manufacturer who knows that the burden of paying for defective merchandise can be shifted in many instances to the employer through the latter's workers' compensation coverage has less incentive to produce an item meeting state of the art safety requirements. The net effect, from an insurance point of view is to shift losses from an unknown amount to the known levels of the various state and federal workers' compensation laws. Employers, then, are placed in a greater financial squeeze.

From the worker's point of view the loss is equally great. If an innocent worker's fellow employee contributed in some way to the injury, the injured worker's damage award against a manufacturer may be reduced by a substantial amount. In a misguided attempt to avoid so-called "double" recovery, S. 44 succeeds in punishing an injured worker in a "double" fashion by limiting his initial recovery to workers' compensation—which never covers pain, suffering or loss of consortium—and then reducing his final damage verdict based on a third party's alleged negligent conduct.

5. Section 11(a) also requires that an injured worker exhaust his or her remedies under the applicable workers' compensation law before a product liability suit can be filed. Theoretically, such an approach is designed to maintain the integrity of the tort and compensation systems by minimizing their interaction. In actuality, however, the net effect will be to discourage product liability suits while at the same time doing nothing to promote safety.

S. 44 ignores the fact that many compensation cases, for a variety of reasons, take years to reach a final determination. Appeals, change in medical and vocational status and other factors all contribute to the time needed for a compensation case to run its course. If suit cannot be filed for many years, the chance of the manufacturing tortfeasor escaping liability increases dramatically. Witnesses disappear or die, memories dim, records are lost, all to the detriment of the injured worker. Once able to sue, the injured worker must backtrack at great expense through the years to prove the truth of his assertions. If successful, he may have his final triumph reduced by the factors mentioned earlier. Clearly, the injured worker becomes a victim in all senses of the term.

6. Section 12(a) of the bill imposes a 25 year statute of limitations on all capital goods, except motor vehicles. The statute begins to run from the date of delivery to the first user. This limitation period does not apply if there is fraud, prolonged exposure, or the injury does not manifest itself within the 25 year period.

This concern with the "longtail" problem is, we believe, unsound because capital goods are generally designed for a long work life and are promoted on the basis of adaptability to future needs. Printing presses, for example, are designed for high speed use for years and generally have the capability of modification to meet anticipated needs as circulation grows. Thus, it cannot be said that modification is not reasonably foreseeable when adaptability is a key selling point.

While this list of our concerns could be lengthened, we believe it is more than sufficient to demonstrate the AFL-CIO's objections to S. 44 and the basis of our opposition to the bill.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. S. 44 proposes pure comparative fault. Is this provision more pro-plaintiff than the majority rule in the states?

Answer. Certainly not. Plaintiffs who are injured by a defective product may have a verdict reduced as a result of the fault of a non-party. For example, if an employer "misuses" or "alters" a product, his actions may lead to a reduction of damages for the plaintiff even though the injury occurred without any contributory negligence on the part of the plaintiff. See §§ 10(a)(1)-10(b)(1).

Question. S. 44 proposes strict liability for construction defect cases. Is this provision pro-plaintiff or pro-defendant?

Answer. The question assumes that strict liability is established as the sole remedy for defective manufacture. S. 44, however, serves to limit strict liability solely to the situation in which a product deviates in a material way from design specifications or performance standards of the manufacturer or if the product deviates materially from otherwise identical units. (§ 5(a)(1) and (2)). Strict liability likely would not apply if the products failed to meet the various safety codes and standards now in use. Additionally, the limitations on collateral estoppel (§ 4(c)(1)) and subsequent remedial measures (§ 14(a)) as well as the possibility of reduction of damages for non-party fault make § 5(a) imposition of strict liability less plaintiff-oriented than the question presumes.

Question. S. 44 proposes strict liability for express warranty defects. Is this provision pro-plaintiff or pro-defendant?

Answer. In isolation, barring defendant manufacturer's use of collateral estoppel would be proclaimant. The same bar in § 4(c)(1), however, eliminates this supposed pro-claimant benefit.

Question. Do you believe that manufacturers should be liable for failing to warn about obvious dangers?

Answer. We believe that, in general, manufacturers should be liable for failure to warn about so-called obvious dangers. The danger which is clear to a sophisticated engineer may not be obvious to a consumer or worker who ultimately uses the product. Liability should not be excused simply on the basis of an injured party's technical knowledge.

Question. Provide case citations, other than *Beshada*, in which pure strict liability was the basis for recovery against a manufacturer for failure to warn about dangers which the manufacturer did not know and had no reason to know.

Answer. We are currently researching the answer to this question.

Question. S. 44 provides that warnings or instructions may be given to an employer, rather than to the employee-claimant, except where the warnings or instructions can be readily attached to the product in a form that would reach the claimant. Where the warning cannot be so attached to the product, who is in the best position, as between the manufacturer of a product sold to an employer and the employer, to ensure that workers receive product warnings and instructions?

Answer. Based upon the situation set forth, it would appear that the employer would be in the best position to warn his employees. If, however, the warning given by the manufacturer is deficient or otherwise inadequate, the manufacturer should not be relieved of liability. Similarly, we can conceive of situations in which a product is so dangerous that merely warning an employer will be insufficient. The mutagenic and carcinogenic qualities of many chemicals may require manufacturers to conduct programs at the employer's place of business so that workers can acquire the requisite familiarity with the hazards involved. In such instances, merely passing along a warning to an employer will be inadequate. We answer this question not simply based on the past, but rather with an eye to potential future hazards which will inevitably develop as we become more reliant on products made of synthetic chemicals. Any law which intends to deal with these products must also be prepared to cope with the expected hazards.

Question. It is estimated that over half of the product liability suits brought for workplace injuries involve employer negligence. If the employer is required to provide workers' compensation and is barred from shifting that cost to the manufacturer, won't he have an incentive to maintain a safe workplace and, thus, reduce accidents?

Answer. One would assume that the alleged high cost of workers' compensation coverage would be incentive enough to provide a safe workplace. Unfortunately, we have not found safety to be a primary concern, even when it is possible to shift the

cost to a manufacturer. It is axiomatic that improved safety programs will reduce accidents.

Question. Do you believe that a claimant should recover for product-related harms due to misuse of a product by the claimant or by a third party?

Answer. The question presupposes a yes or no answer when the matter does not lend itself to such simplicity. The degree of "misuse" must be examined. If the "misuse" is minimal, there is no reason to excuse a manufacturer for producing a defective product which causes injury. There may also be instances when the defective product may cause injury regardless of the misuse.

Question. Can you give examples of instances in which a product caused a harm not attributable to misuse, alteration, or modification of the product and liability should not be imposed on the manufacturer of the product? If so, can you specify a fair, clear test for separating those instances from cases in which liability should be imposed on the manufacturer?

Answer. Perhaps the best example suggested by the question is the Salk polio vaccine. The social value and utility of the vaccine so outweighs the risk of adverse side effects that it is extremely unlikely that liability would be imposed for harm. The same cannot be said, however, of lesser products such as the swine flu vaccine that caused more problems than it cured.

The comparison between these two examples demonstrates the difficulty in articulating a definitive test. Each product, vaccine, etc., must be examined on its own merit.

Question. Would you support a bill that imposes liability for all harms caused by products?

Answer. Our object is to see that workers and consumers are protected from injury. The current state of the law generally provides excellent protection. There is no desire at this time to impose liability for every harm caused by products.

Question. Tort law holds architects, engineers, lawyers, doctors, and virtually others to a standard of reasonableness. Harms caused by their failure to make decisions or judgments in a reasonably prudent manner will subject them to liability. How do you justify holding manufacturers to a different standard, a standard of strict liability for harms caused by decisions or judgment they make regarding a product?

Answer. Your question points up a fundamental difference between the individuals mentioned and the problem faced herein. In one instance there is the obvious human element. In a sense, it is simpler to check and guard against human imperfection via second opinions or the equivalent. On the other hand, a consumer cannot guard as easily against imperfections in inanimate objects. He must rely on the product's record or on a warranty or other informational support provided by a manufacturer. Additionally, a product may be made up of a number of component parts which require blind reliance as the option of a second opinion has been removed by incorporating them into the whole.

Question. Do you believe that where there is an innocent manufacturer and an innocent plaintiff the manufacturer should pay for harms caused by a product? If so, why? Do you think the innocent manufacturer should pay even if the plaintiff has received compensation for the product-related injury from another source, e.g., from insurance or workers' compensation? Would your answer be the same if the innocent manufacturer is a small business that would go bankrupt if forced to pay?

Answer. The law has developed to the point where the balance of equities has tipped in favor of the injured consumer. The manufacturer is felt to be in the best position to absorb the loss as against the innocent consumer. As noted in our testimony, it is often the case that a manufacturer will decide that the likelihood of a grave risk coming to actuality is so small that it does not warrant, from a profit point of view, the additional expense of an alternative design or added safety device. We certainly regret the possibility of bankruptcy, but many factors enter into bankruptcy, not just liability for defective products. Additionally, too many injured workers and consumers have been victimized by the bankruptcy laws which now permit companies to continue functioning while disposing of their liabilities.

As to this issue of collateral sources such as workers' compensation, it should be noted again that so-called no-fault payments do not provide payment for pain and suffering, or loss or consortium, items of damage which plaintiffs are entitled to receive under current law. If a tort judgment is rendered, plaintiffs usually must reimburse the compensation carrier to the extent of the latter's payments, thereby preventing double recovery.

Question. Do you believe that manufacturers should have to pay for harms caused by employer fault? Why or why not?

Answer. Again, the question appears to call for a short answer to a complex issue. The fact that many states now utilize some form of comparative fault makes it unlikely that a manufacturer will have to bear the burden of the cost of the entire harm. It may well be the case that the underlying defect may have been sufficient to cause the harm at some point, while the employer's actions may simply have hastened it. Under such circumstances, there is every reason for the manufacturer to bear a substantial portion of the loss.

Question. Isn't it likely that improper design would be discovered within the first 25 years of use? And that an incident occurring after 25 years would likely be due to employer or employees' fault?

Answer. In some instances, design defects may be discoverable within a brief period of time. In other cases, however, products are specifically designed for long use, making it less likely that design defects will become evident. Newspaper printing presses, for example, are intended for use for periods in excess of 25 years. Design defects which cause harm thereafter may have nothing to do with employer or employee actions but may be a result of metal fatigue caused by the wrong choice of materials at the time the press was designed. In point of fact, the employee may be lulled into a sense of security by the time factor, thereby leading to a more severe injury when the defect manifests itself.

Question. What is wrong with having the product liability system be a tort fault system and the workers' compensation system be a no-fault system?

Answer. When workers accepted the concept of workers' compensation as an alternative to suing the employer for workplace injuries, the tradeoff was to provide injured workers with limited but prompt payments for injury, regardless of fault. Workers gave up the right to recover damages for pain and suffering. Creation of a no-fault product liability system will result in a similar diminution of recovery for injured people. Those who do not have workers' compensation to fall back upon, at least to a limited degree, will receive far less than the full extent of their damages.

Question. Do you believe the American worker wants to pay in the price of goods he buys (i.e., step ladders, lawn mowers, bicycles) the cost of lawsuits by people who are injured because they misuse a product, alter a product or negligently handle a product?

Answer. American workers and, presumably, all citizens want the products they buy to be safe for the intended use. If products are designed and manufactured with this approach in mind, costs related to lawsuits will diminish. If user misuse or negligence occurs, recovery by the injured party will be unlikely.

Question. Excessive product liability costs are driving small businesses to the wall. This results in a loss of jobs in a tight economy. We have had dozens of examples of unfairness in product liability law. In light of these facts, isn't it in the interests of the worker to support a fair and balanced product liability law?

Answer. We find it difficult to ascribe all of these losses to baseless suits. Often, manufacturers continue to produce an item, knowing it has faults, but hoping that profits will exceed losses from injuries. This approach is a matter of questionable business judgment, which is the true source of the financial difficulty. One need only look at Ford and the Pinto as examples of how a business decision not to rectify a design defect can lead to horrendous injuries and high costs, all of which were probably avoidable.

Question. The state of repose in S. 44 is considerably shorter and less extensive than statutes of repose now in effect in 18 states. Do you agree S. 44 is better for claimants than these statutes?

Answer. Obviously, a longer statute of repose is better for claimants.

Question. Worker compensation is by definition a compensation system. It provides limited, out-of-pocket damages and no pain and suffering and no punitive damages. If we have a strict liability no-fault system for products, i.e., a compensation system for harms caused by a product, why shouldn't we have a limited damages system also?

Answer. If a no-fault product liability system was established along with a limited damage system, injured claimants would receive far less than the value of their damages when pain, suffering and loss of consortium are considered. These elements of damage are integral parts of tort recovery and serve to make the injured party whole. Reduced damage verdicts or schedules for specific losses will not accomplish this purpose. Additionally, reduction of damage amounts will do little to encourage safety as manufacturers will surely prefer to pay set damages rather than make expensive changes to improve the safety of a product.

Question. Should manufacturers have to pay for harms caused by employer fault where there was no negligence involved in the design of the product causing the harm?

Answer. If the harm indeed is caused by employer fault alone, it is quite unlikely that a manufacturer would be held liable, even under current laws. On the other hand, if the manufacturer should have foreseen the act of the employer, then the manufacturer should be held liable for the harm.

Question. Why should manufacturers be treated differently in the law of torts than engineers, architects, or a lawyer, like yourself, all of whom are held to a negligence standard?

Answer. Please refer to our answer to Question 13 above.

Question. You indicated that you are against abolishing collateral estoppel. Suppose there are two workers with identical injuries. Worker A loses his case against the manufacturer. Should collateral estoppel apply so Worker B also loses his case?

Answer. Collateral estoppel involves an identify of issues which must appear before the doctrine can be applied. If Worker A loses his case based solely on liability issues, then Worker B may lose as well if there is a substantial identity of circumstances. If, for example, the way in which the injury occurred differs from the situation with Worker A, collateral estoppel could not apply.

Collateral estoppel does pay an important role in occupational disease cases. If a number of workers are exposed to injurious stimuli under like circumstances, there is no reason to hold ten or more trials on the issue of liability. To do so needlessly prolongs the course of litigation and increases costs for all parties.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. I am aware that Sections 9, 10, and 11 of S. 44 particularly affect workers in the workplace. I understand that the concern of the AFL and of those that you represent extends beyond these provisions to other major provisions of S. 44. Would you comment?

Answer. We refer to the attached memorandum as a general statement of our concerns regarding all of the provisions of S. 44.

Question. If S. 44 is enacted, do you think injured workers who could otherwise prove their case would be barred by the statute of repose?

Answer. Certainly the imposition of a statute of repose could bar recovery where all of the other issues in the particular case favor an injured worker; this introduces a further element of unfairness into S. 44.

Question. S. 44 requires employees to use the workers' compensation system first and then product liability. Will delay of workers' third-party actions, given the delay in workers' compensation disease settlements, allow manufacturers off the hook?

Answer. Many workers' compensation cases require several years to reach a conclusion due to complexity of such matters as the nature and extent of the injury, causal relationship questions, rehabilitation and the like. Occupational disease cases often take longer as many claimants are deceased, thereby making the case more complicated and time consuming. These extended delays will be exacerbated by S. 44 as insurance carriers and self-insured employers fight cases in which the right of subrogation is removed. If injured workers must wait to pursue third-party actions for several years, the time delays will benefit the tortfeasor. Witnesses will die or disappear, memories will fade, all while costs escalate for the injured worker. He may recover from the injury, but the path to recovery will be far more difficult.

Question. S. 44 prohibits third-party manufacturers from bringing suits against an employer. Will this discourage safety in the workplace?

Answer. Some have argued that elimination of the right of subrogation will lead employers to improve workplace safety. Experience teaches us, however, that safety is rarely a primary concern. If the cost of improvement of working areas is high, it is likely that employers will prefer to risk injury or to attempt to reduce benefits through legislative action. Overall, business has traditionally indicated a preference for cutting costs by reducing benefit levels rather than eliminating the cause of accidents and injuries.

Question. Why make employees bear the cost of the employer's fault through the workers' comp offset?

Answer. We can see no reason to impose the cost of the employer's fault on injured employees. It is simply one more burden placed on an individual whose injury occurred through no fault of his own. When the dust settles, it is the injured worker who sustains not only the injury but also has portions of his right to recovery abrogated.

Question. In what situation is a worker's use of a workplace product voluntary?

Answer. The question is unclear, but we assume that you refer to the use of products such as cleaning solvents, for example, as opposed to the handling of tools and machinery used in the work process. A worker may choose to utilize a particular product to remove grease from a work area or from his person. If the product is defective or warnings on it are inadequate, injury may result.

Senator KASTEN. The next panel includes Mr. Pope, Mr. Eginton, Mr. Jeans, and Mr. Floss.

I might say as panel 2 is being seated that we invited, at the request of Senator Hollings, the National Conference of State Legislatures to participate in this hearing. However, we have been informed that they will not be able to testify. I understand that the conference has a general policy against legislation which would preempt State law and that their position on product liability is basically an application of this overall policy.

I have not been informed of any polling of the State legislatures. I can only assume that no such polling of State Legislators has taken place.

I am grateful, however, to have with us today Mr. Rich, who is the chief of staff of the New York State Senate Standing Committee on Commerce and Economic Development. Mr. Rich will present the statement of State Senator Walter Floss of New York State, who will not be able to testify at this hearing due to his legislative responsibilities in the New York State Senate.

I understand they have a closed hearing or some extraordinary process that is going on there, so we are happy to have you representing your boss. We will begin the panel with the Honorable Jack Pope, who is Chief Justice of the Supreme Court of Texas, who is appearing at the request of Senator Hollings.

Mr. Pope.

STATEMENTS OF HON. JACK POPE, CHIEF JUSTICE, SUPREME COURT OF TEXAS; HON. WARREN W. EGINTON, U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR CONNECTICUT; LEWIS O. RICH, EXECUTIVE DIRECTOR, COMMERCE COMMITTEE, NEW YORK STATE SENATE; AND PROF. JAMES W. JEANS, SR., SCHOOL OF LAW, UNIVERSITY OF MISSOURI—KANSAS CITY

Judge POPE. Thank you very much, Senator. I do deeply appreciate this opportunity to appear and testify. I am accompanied this morning by the constitutions of 50 States, the Constitution of the United States, hundreds of years of common law in the negligence field, which years have not been preempted.

I appear on behalf of my State, of which I am the chief justice. My concerns are not the terms of the proposed bill. Many of those terms I applaud; some of them I would alter. My concern is the system and what the bill will directly do to it and what it portends for the future of State judiciaries.

First, I respectfully suggest that the bill, if enacted, will nationalize the judiciary of the States. It preempts the major part of negligence and products law. It preempts parts of contract law, insurance and fraud law. It freezes the law while it is still developing. It displaces the States sovereign charge and their abilities to structure and develop the common law, as traditionally and historically they have done.

It wields the commerce power in a fashion that would impair the States ability to function in a Federal system. It forces directly upon the States its choices as to how essential decisions about the conduct of the judiciary are to be made.

I say with respect, Mr. Chairman, that if comparable requirements that are here proposed at the decision level of a branch of government, if a comparable requirement were imposed upon corporate decisionmaking of all of the affected suppliers it would meet with an outcry of nationalization of industry, and I would join them in that outcry.

When we nationalize a branch of a government, it becomes very easy to nationalize industry itself. If Congress and industry can nationalize the States and their judiciaries, surely it will be easy to nationalize the whole insurance industry. I know of no act of Congress that has so affirmatively invaded the traditional common law of torts, contracts, insurance fraud, deceit, warranties, State statutes and State constitutions as this act.

Second, the proposed law is a threat to Federalism. I read in the hearings report that Federalism is intact under this bill because there will be no new bureau and no additional cost to the Federal Government. We do not have those now. The system is now self-operating. But a statute that abolishes in whole or in part a whole branch of State government needs no bureau. It is a preemption to the point of extinction.

Third, the proposal destroys the common law. I am the head of a judicial system that disposes of, in the county courts and in the district courts, 1,200,000 cases by judgment every year. The total of all Federal litigation disposes of one-fifth, 240,000 cases. I say that this proposed bill is killing the system that has developed 342 branches of the law.

Fourth, this is an unspoken attack upon the common law jury. A safe product indemnifies and protects the supplier. A safe product produces no damages. It is the unspoken findings of juries, those findings, that have driven from the market, not through the Federal Government but through the judicial system, the Pinto, flammable fabrics, thalidomide, birth control pills, and rifles.

And, finally, I say that this is an attack upon the U.S. Supreme Court. Five Justices in the last 12 months have cried out to this Congress to give them some relief. That relief has not come, and if we do with this act and impose upon the U.S. Supreme Court what the experience of FELA has done, we have put all of these cases in the channel that have no place to go except the U.S. Supreme Court to adjudicate conflicts.

I thank you, Mr. Chairman, and I do have a statement that I would like for the record.

[The statement follows:]

STATEMENT OF HON. JACK POPE, CHIEF JUSTICE, SUPREME COURT OF TEXAS

Mr. Chairman and distinguished members of the committee, I am Jack Pope. I am and appear as Chief Justice of the Supreme Court of Texas. I thank the committee for the invitation extended on Wednesday of last week to appear and express the views of a common law judge, and those of a judge of the state courts. It is the state courts that try and dispose of 98 percent of all lawsuits in this nation. In my jurisdiction the county and district trial courts render judgments in 1,200,000 cases a year. The Federal courts of all of the United States render judgments in less than a

quarter million cases a year. So I am talking about the courts and the judiciary that are the ones who actually eye-ball and administer justice to the citizens of this country.

I have read as much of the testimony in the hearings before this committee as my limited time permitted. To this point the emphasis has been focused upon the costs to those who furnish things placed in the stream of commerce. With respect, I want to broaden this perspective and address some more fundamental principles and subjects.

THE PROPOSED COMPARATIVE FAULT BILL WILL NATIONALIZE THE JUDICIARY OF FIFTY STATES, THE DISTRICT OF COLUMBIA, AND SIX POSSESSIONS

The bill "supercedes any State law regarding the matters governed by this Act." S. 44 § 3(c). Those matters intrude upon the whole area of tort reparations and parts of contract law. The preemption is stated in the bill to include (1) strict or absolute liability in tort, (2) negligence or gross negligence, (3) breach of express or implied warranty, (4) failure to warn or instruct, (5) any other theory that is the basis for an award for damages for loss or damage caused by a product. *Id.* § 3(a). These matters have always been the domain of the states.

In Texas, the "any other theory" will effectively repeal provisions of our Deceptive Trade Practices Act and probably others. Tex. Bus. & Com. Code Ann. §§ 17.41-.63 (West Supp. 1982). The Texas DTPA protects persons physically harmed by defective products that were sold on representations that the products were of a particular standard, quality, or grade when they were of another. See *Hurst v. Sears, Roebuck & Co.*, 26 Tex. Sup. Ct. J. 278 (March 16, 1983). This proposal would repeal that law. If you enact this proposal, you will also oust the Texas Legislature from enacting laws that apply to tort cases or that avoid fraud and deception that cause physical harm.

The nationalization of state judiciaries concerning tort reparations and related contractual rights is the most far-reaching attack upon an independent judiciary and constitutional government since President Roosevelt's court-packing bill. Roosevelt, a result-oriented President, following his great 1935 victory at the polls, made an effort to control the Supreme Court. The outcry, from those who wanted the court system free from interference, resulted in the defeat of the proposed legislation.

We today hear an outcry about jury verdicts, but from the other side. President Roosevelt wrote a Florida lawyer in 1935: "[W]e do not want to take away states' rights but, at the same time, there are a good many problems which, under modern conditions, can be solved only by Federal action." Letter from Roosevelt to Armistead Brown (July 6, 1935) (Roosevelt Papers, Hyde Park). Today we read in the report of this committee on S. 2631 the same reason for intruding upon state judiciaries:

"Experience with the state approach and the realities of the marketplace demonstrate that the individual States cannot resolve the uncertainties in the product liability tort litigation system. The Committee believes that Federal action is necessary."

S. Rep. No. 670, 97th Cong., 2d Sess. 7 (1982).

The lesson from history is to leave the judiciary alone. Those who have the votes today may lose that advantage. Neither President Roosevelt nor this committee should intrude upon the judicial branch of government.

This proposal attacks the court decisions of developed and developing law; it attacks and negates the progression of the common law; it supplants the procedures by which we submit issues and admit evidence; it substitutes untested standards for settled standards used in the state courts.

Congress should not enter the field of substantive tort law that is administered by each state. If Congress intrudes into this area, it will be easy to intrude into the whole field of insurance law, contract law, family law, juvenile law, criminal law, and all of the others.

THE DECLARED PURPOSE TO ACHIEVE UNIFORMITY OF STATE JUDICIAL PROCEEDINGS VIOLATES OUR SYSTEM OF FEDERALISM

The same Constitution that created the Congress also secured the state and its judiciary. The judiciary of a state is not a creature of Congress. States are not creatures of Congress. States are not agencies of Congress. States and their judiciaries are as constitutionally secure as this Congress. I do not question the right of Congress to regulate interstate commerce; I question the policy as well as the right of Congress to supplant a constitutional branch of state government.

It is one thing to regulate commerce, but a great constitutional question is presented when the Congress regulates the state judiciary. There are attributes of sovereignty attaching to every state government that may be impaired by Congress. *National League of Cities v. Usery*, 426 U.S. 833, 844 (1976). The constitutionality of the bill is perhaps the first question that must be added to the present burdens of the U.S. Supreme Court. I suggest that such a first question is an unnecessary and a disruptive one. It will arise only if Congress adopts a New Deal, Fair Deal, Great Society approach and nationally moves upon state judiciaries to get them in line. Those other administrations did not tamper with the judiciary.

THE PROPOSAL DESTROYS THE COMMON LAW

Products liability is the child of the common law. I find it remarkable that critics complain that the common law varies from state to state. The field of products liability would never have emerged if the common law of those first few states had not varied from the others. The common law is still growing from the experience of the states. It should not be killed by a statute and especially not while still growing.

The report on S. 2631 attacks the development of strict liability by the common law. S. Rep. No. 670, 97th Cong., 2d Sess. 3-6 (1982). It concludes that this development is bad. The common law has never needed me or anyone else to defend it. It has matured our principles of contract, tort, property, insurance, and some 430 other bodies of law. It has been the means by which we hold onto the certainty of the past while moving deliberately one step at a time into the challenges of the future. I leave the defense of the common law to Lord Coke and Lord Mansfield, to Justices Holmes and Hand and Cardozo and a thousand others whose genius has molded our common law.

Don't kill the common law.

THE PROPOSED BILL IS AN ATTACK UPON THE JURY

Witness after witness has appeared before this committee with stories about the costs to industry of products litigation. Juries of this country consider costs also, but they do not ignore costs about which there has been no substantial testimony before this committee. They also weigh costs to customers who are hurt and killed. In court, the issue is whether the manufacturer factored the element of safety into the product. A defendant whose product is safe wins; one whose product is unreasonably dangerous loses. The issue in court is product safety. I do not find that "safety" has been given the consideration that juries do. It has been the juries of this country that have looked at the costs to industry as well as costs to the customer. One thing in these trails has been uniform in every state. Every one of those jury findings has been upon an issue that asked if the product was unreasonably dangerous.

It is the justice system and not industrial engineers who are driving from the market many deadly products that have been approved by governmental regulatory agencies and industrial safety examiners. It was after the products were "in the stream of commerce" that they were driven out in the case of the Pinto, flammable fabrics, thalidomide, birth control pills that caused cancer and stroke, tampons that produce toxic shock, and many others.

It is the juries of this country that pass on these issues after hearing witnesses. If this committee desires to see the costs involved, I feel sure that this room could be filled with living exhibits of paraplegics, quadraplegics, wheel chair professionals, deformed children without limbs, burned bodies, cripples, vegetables. These too are costs.

THE PROPOSED BILL IS AN ATTACK UPON THE DEVELOPED TRIAL PROCEDURES OF EVERY STATE

Products liability is the present style of the law. We have developed in our jurisdiction settled principles for a simple submission of cases that concern (1) unreasonable defective products, (2) design defects, or (3) marketing defects. We have developed fair issues and fair instructions. This had not been easy, but every lawyer in Texas knows what his charge will look like, because the rules are developed and published. This, no doubt is true of all jurisdictions.

We have a settled and reckonable body of substantive law, procedure, and evidence. We have resolved many problems that we ought not to revive. We have not answered every question. For example, we have in Texas a problem about two conflicting statutes concerning the right of contribution, but we will resolve that one too.

The proposed bill injects into the proceedings many new questions. For example, it changes our definitions about design defect. It raises a question whether sections 5(c) and 5(d) are absolute defenses. If so, it is confusing in a comparative fault bill to add new absolute defenses. We have the same unsettled questions about section 6(d).

State judges have arduously worked to determine what part of a charge should be handled by issues and what part of instructions. The bill is not helpful. The proposed bill renders our body of settled law in hopeless confusion, the thing that generates work for the United States Supreme Court.

The proposed bill invalidates efforts to simplify the trial of negligence, products, and related cases.

Driver A sues both driver B and supplier C. A court cannot try in the same case the supplier C under the novel procedures of this bill and try driver B in the same case under simple Texas procedure. Since supplier C's case must be tried by the terms of the bill, the Texas procedures and rules must be scrapped.

A sues doctor B and doctor B impleads C, the pharmaceutical company. The suit against the doctor cannot be tried under one system and the suit against C by another.

This act wrecks all progress that every state has made in the simplification of personal injury cases.

FEDERALISM SHOULD CONTINUE AS A VIABLE FORCE IN OUR CONSTITUTIONAL SCHEME

The declared purpose of this bill is to enforce uniformity in every state. It undertakes to legislate uniformity in substantive law, procedure and evidence, and to supplant state input in order to achieve that purpose. We do not live in a uniform world or society. We do not sing the same song or the same note. We belong to diverse political parties. The fifty states have diverse laws that govern many subjects—capital punishment, divorce, the sale of liquor, blue laws, the government of cities by home-rule or territorial laws, child and spouse support laws, probate laws, sales, insurance—the whole index of laws that are in some ways different. But there is similarity in the diversity. We review each other's laws, sift from them what we find good and reject what we find bad. We exchange, borrow, adopt, move forward. This is the power of innovation.

Diversity and pluralism nurture and enrich the whole law. They are the essence of our federal system. The strength of our legal culture has been our capacity to take the good from here and there. We should not abort this system.

State governments and state judiciaries have been the outriders of our whole society. Uniformity imposed from Congress over our whole nation would have robbed us of the many contributions from the great State of Wisconsin, the state of the chairman of this subcommittee. It was the diversity, pluralism, and experimentation practiced by that state that contributed to the entire nation such ideas as the direct primary, initiative and referendum, the corrupt practices acts, civil service, lobby control, public utility commission, state inheritance taxes, unfair trade practice acts, stock regulations, child and female labor laws, and worker compensation laws. These and scores of other values are the products of our federal system.

When Texas moved to comparative negligence, we looked to the State of Wisconsin to profit from its experience. We bought Wisconsin law books that taught us how it would work with simple special issues and we used them. I personally traveled the State of Texas lecturing lawyers on how it could work. I taught them the Wisconsin system. This committee in its proposed bill is borrowing from that same system. We have moved from comparative negligence to comparative fault. I applaud that. We have drafted a bill in Texas that adopts the same sound principle. We thank you, but we do not need help in seeing it through. Our legislation will probably be enacted before this bill.

THE PROPOSED BILL THREATENS THE SURVIVAL OF THE UNITED STATES SUPREME COURT

The proposed bill may be the final impact that submerges the United States Supreme Court in a sea of cases. It will channel the deluge of statutory construction and conflicts cases to that court.

Section 3(d) says that "The district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on sections 1331 or 1337 of title 28, United States Code." That means that all cases except diversity cases will reach the U.S. Supreme Court by going through the state courts.

Fifty jurisdictions will begin construing terms, such as "proximate cause," "otherwise identical units," "practical technological feasibility," and scores of others. Conflicts of statutory construction and application are inevitable. Those conflicts will be eligible, at least, for review by the Supreme Court. Even though the U.S. Supreme

Court may not grant a writ, its time and energies must be used to study it to make that decision.

The experience with F.E.L.A. cases is in point. The Congress legislated about negligence cases. Cases then reached the U.S. Supreme Court in larger numbers, and that court granted writs on points that questioned the sufficiency of the evidence to support jury findings. The court was pressed to research and write opinions to explain why they accepted so many negligence cases. They were construing a federal statute and the judges believed that state courts should not reverse cases favorable to the plaintiff, on the grounds that a finding was against the great weight of the evidence, or that the evidence was insufficient.

The reason assigned for granting writs to review evidence in a case that the facts would not again be matched was to "secure uniformity of decision." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1922). Justice Frankfurter resisted the numerous grants except when there were "questions that fairly involved the construction or scope of the statute." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 532 (1956) (Frankfurter, J., dissenting). His dissenting opinion in *Rogers* detailed how each term of court was burdened with written opinions on these negligence cases involving a review of facts. *Id.* at 548-58. The many writs were granted to set a "mood" so state courts would reverse no cases for the plaintiffs.

Chief Justice Warren E. Burger has long tried to find a Congress that will listen to him before the whole system collapses from overload. He repeated last February before the American Bar Association what he has been saying for thirteen years. He said that "in just the short span of 14 years, Congress has enacted more than 100 statutes creating new claims, entitlements and causes of action." Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A.J. 442, 442-43 (1983). He said that in many cases "there are few precedents to guide the courts . . ." *Id.* In addition to the increased number of written opinions, that court had 5,311 cases on its docket. All of those cases must be reviewed for a determination whether a writ will be denied or an opinion written.

Justice O'Connor, the day before the Chief Justice made his address, spoke to the Fellows of the American Bar. She said that the court was already working at maximum capacity. Justice Rehnquist said the same thing in an address on April 7 to the Jurists-in-Residence at St. Louis. On August 9 of last year, Justice Powell, speaking to the A.B.A. Division of Judicial Administration, warned that this situation is not a crisis for the courts; it is a crisis for justice, for claims for human rights, for the rule of law, for the nation. Justice Stevens, speaking on August 6, 1982, at the Annual Banquet for the American Judicature Society, said that the court is granting more petitions, writing more pages and more opinions, and is deciding more cases than ever, but is losing ground. He said the court is too busy working to tend to the problem of being too busy.

With all of this, we would wipe out the developed jurisprudence of fifty states and start over making new precedents, creating conflicts that have no place for resolution except in the United States Supreme Court.

This is an attack upon the Supreme Court of the United States.

I respectfully ask that this subcommittee and this Congress leave to the judiciary the resolution of questions that have always been their responsibility. I ask that you leave the state judiciaries alone. This far-reaching bill, if enacted, will leave too many established institutions in peril.

The bill itself, I suggest, is unreasonably dangerous.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. The rationale for enacting a Federal product liability law is based, in part, on the fact that manufacturers and product sellers doing business on an interstate basis are subject to varying standards of liability in the various states. Do you believe that family law, juvenile law, criminal law have the same interstate commerce aspects as product liability?

Answer. I believe that under the United States Supreme Court's interpretation of the commerce clause, Congress would be able to legislate in the family, juvenile, or criminal law areas as they choose. I also believe that those areas would be an improper subject for federal legislation just as this bill is an improper exercise of the commerce power.

Tort law has traditionally been left to the common law of the states for development as has contract law and family law. This bill directly intrudes into that devel-

opment in contract law, insurance law, and evidence law as well as in tort law. Once this intrusion has begun, the precedent for future intrusion has been set. The foundation will be severely shaken by this bill. I do not believe that we should make this intrusion into that development with this bill.

Each individual state should evaluate its interests and policing considerations in formulating a standard of liability. If a manufacturer chooses to benefit from the market for its product in that state, he should be subjected to liability in that state under that state's standards.

Question. Do you believe that codification of contract issues through, for example, the Uniform Commercial Code or codification of evidentiary matters, through Federal and state statutes is an intrusion upon the judiciary and an attack on court decisions?

Answer. Yes. Any comprehensive codification of the common law presents some intrusion upon the judiciary. Adoption of the U.C.C. or the Federal Rules of Evidence, however, could never be considered precedent for such a measure as S. 44. If anything both the U.C.C. and the Federal Rules of Evidence serve as examples of the type of legislation most appropriate in a federalist government with clear separation of powers. The U.C.C. was not forced upon any state. Each state considered the model proposal and then made such modifications as it deemed appropriate to bring the code into line with the law of each jurisdiction. The U.C.C. is analogous to the Model Uniform Product Liability Act. S. 44 on the other hand preempts all existing state law despite the fact that a considerable number of states have rejected state-proposed changes similar to the changes proposed by S. 44.

The Federal Rules of Evidence present an even better example of when, if ever, the legislature should exercise a judicial function. The Rules were actually promulgated by the Supreme Court and then merely approved by an act of Congress. The Rules pertain only in Federal courts and do not affect state law. In fact, a federal court may be called upon to apply state evidentiary standards where there is substantive conflict. The Federal Rules may serve, however, as a guideline for those states seeking to change their existing law of evidence.

In September 1983 Texas courts will operate under new rules of evidence which are largely based upon the existing Federal Rules of Evidence. There are several significant, substantive changes in the Texas rules. One such change is an additional sentence to Rule 407 of the F.R.E. which precludes evidence of subsequent remedial measures to prove negligence or culpable conduct. The Texas Rule, however, provides that "Nothing in this rule shall preclude admissibility in products liability cases based on strict liability." Tex. R. Ev. 407(a) [effective Sept. 1, 1983]. This Texas evidentiary rule would be expressly preempted by S. 44 despite the fact that the Texas Legislature and Texas Supreme Court have considered the federal position and rejected it.

Question. Can you give examples of instances in which a product caused a harm not attributable to misuse, alteration, or modification of the product and liability should not be imposed on the manufacturer of the product? If so, can you specify a fair, clear test for separating those instances from cases in which liability should be imposed on the manufacturer?

Answer. Yes. A product may cause a harm, but unless it is found to be "unreasonably dangerous" the manufacturer should not and will not be held liable. The standard for "unreasonably dangerous" in Texas for manufacturing and marketing defect cases is:

"An 'unreasonably dangerous' product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics."

§ 71.01 3 State Bar of Texas, Texas Pattern Jury Charges PJC 71.01, 71.04 (1982). For design defect cases the standard of unreasonably dangerous is,

"A 'defectively designed' product is a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."

3 State Bar of Texas, Texas Pattern Jury Charges PJC 71.02 (1982).

Both standards utilize a reasonableness idea and apply them to the product itself. The jury can then evaluate each product under these guidelines. These standards are fair to both the manufacturer and consumer.

An example of a product not being found unreasonably dangerous when there has been no evidence of misuse, alteration or modification is *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980). In that case the jury failed to find that the omission of a kill switch on a bass boat constituted an unreasonably dangerous (defective) design. The case was appealed because of the submission of erroneous defen-

sive issues concerning the "state of the art" doctrine. The Texas Supreme Court reasoned that the submission amounted to only harmless error where the jury had determined that there was no defect and that failure to establish that the product was unreasonably dangerous because of defective design was sufficient to support a judgment that the plaintiffs take nothing.

Question. Would you support a bill that imposes liability for all harms caused by products?

Answer. No. First I would never support any bill that mandates the standard which the state judicial systems must impose. Tort law is a state concern. Irreparable harm to federalism would be caused by the intrusion of the federal government into the states' common law.

Second, I do not believe that a standard of guaranteed recovery is at all appropriate to harms that are caused by products. Manufacturers are not, and should never be, absolute insurers of their products. The policy considerations which cause Texas to enact workers' compensation, for example, simply do not compel such a system for product related injuries. I do believe that strict liability in tort is the appropriate standard of liability. The Texas Supreme Court has noted,

"We wrote in [1969] of our final yield to the irrefutable logic that the rule of strict liability is the only practical vehicle for protecting the public against harm caused by defective products."

Turner v. General Motors Corp., 584 S.W.2d 844, 848 (Tex. 1979). The choice made by Texas in 1969 should not be revoked by federal legislation in 1983.

Question. Would you support a bill that imposes liability for all harms caused by products with damage limitations similar to those in compensation statutes?

Answer. No. See answer to question 4 above.

Question. Do you believe that where there is an innocent manufacturer and an innocent plaintiff the manufacturer should pay for harms caused by a product? If so, why? Do you think the innocent manufacturer should pay even if the plaintiff has received compensation for the product-related injury from another source, e.g., from insurance of workers' compensation? Would your answer be the same if the innocent manufacturer is a small business that would go bankrupt if forced to pay?

Answer. "Innocent" is not a term used to describe the responsibility of a manufacturer of consumer products unless one is discussing the criminal (or lack thereof) nature of his behavior. "Innocence" and "guilt" have nothing to do with civil liability. The use of the word "innocent" in this context indicates to some degree the lack of understanding by Congress of the judicial process.

In those jurisdictions such as Texas where strict liability is imposed upon the manufacturer of a product, the "fault" of the manufacturer is not considered. Instead, focus is placed upon the product itself and whether or not the product is defective. The fault of the plaintiff is compared on a causation basis with the defectiveness of the product. The rationale behind the imposition of strict liability is that the manufacturer who has made a profit from production is in a better position to distribute the risk and bear the costs of the injury than the consumer.

Authors Scott Baldwin, Francis Hare, Jr., and Francis McGovern suggest that "at least four general goals or social policy bases are commonly expressed to support the adoption of strict liability in tort: (1) to create an incentive to make 'safer' products, and conversely a deterrent to unsafe products; (2) to compensate victims . . . ; (3) to allocate the risk of loss . . . ; and (4) to increase accountability in the mass marketing of goods."

S. Baldwin, F. Hare and F. McGovern, *The Preparation of a Product Liability case* 32 (1981).

If the injured plaintiff is insured or covered by workers' compensation, he should still be entitled to recover full damages from the product supplier. Making the consumer insure against the risk of injury encourages carelessness on the part of the manufacturer. The manufacturer is in a better position to test the quality of his products and weed out the flaws.

Workers' compensation is a statutory scheme for compensating victims who are injured on the job. In exchange for a reduced burden of proof on liability, the worker receives a set amount of compensation according to his particular injury which is often well below his actual damages. Under this scheme the employer is required to provide workers' compensation coverage for his employees. In any case where a plaintiff receives compensation benefits and is successful against a product manufacturer, the employer's insurer is entitled to a right of subrogation for the amount of comp benefits paid. To limit a workers' recovery to the amount of workers' compensation is to deny him a full recovery where he has clearly been wronged. To subtract the amount of comp recovery from the amount of damages attributed to the manufacturer (as S. 44 would do) is to shift to the employer's comp carrier the

responsibility for unreasonably dangerous products. This would have two obvious results: workers' compensation insurance rates would escalate because comp carriers would no longer be able to receive subrogation and employers would be less, likely to provide innovative products for their employees use on the job.

The present system in Texas offers a far more equitable solution. The determination that a product is defective should place the entirety of the responsibility upon the manufacturer of the product which causes the harm. Workers' compensation should control employer practices and products liability should control the manufacture of unreasonably dangerous products. They are separate actions based on separate legal theories as a response to different societal needs.

My answer must be the same even if the manufacturer is a small business. It should not be a defense for a manufacturer of dangerous products that injure consumers to simply avoid liability by claiming his business is "small." Whatever size the business, the manufacturer is in a better position to insure against the risk of product-related injury than the consumer.

Question. Do you believe that a claimant should recover for product-related harms due to misuse of a product by the claimant or by a third party?

Answer. No, as long as the misuse is unforeseeable. A manufacturer should be held responsible for a product which is unreasonably dangerous for its foreseeable uses. A manufacturer should be held liable for injuries resulting for a use of the product that the manufacturer should have foreseen, not just the uses which it intended. The manufacturer is in the best position to anticipate the reasonable uses to which the product will be subjected. The Restatement (Second) gives some examples, "If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger and a product sold without such warning is in a defective condition."

Restatement (Second) of Torts, § 402A comment h (1965). The misuse should be compared with the defect to determine relative causation and appropriate damages.

Question. Can you explain why a plaintiff will be unable to sue both a driver and a supplier of the motor vehicle in the same action if the federal bill were enacted?

Answer. The total preemption by the federal bill of Texas law and procedures would practically prevent one trial against both defendants. For example, the bill would enact a pure comparative system of comparative responsibility. Texas negligence law is that of a modified comparative system in that if the claimant is found to be more than 50% negligent, recovery is barred. It would not be possible to allocate responsibility under both systems in the same trial. Similar inconsistencies exist as to evidence rules, the effect of workers' compensation set offs and punitive damages. If there were a single trial against both defendants, attempting to try the case under the special rules applicable under S. 44 and under Texas law would be impractical in my opinion.

Question. Would you support enactment of product liability statutes at the state level?

Answer. Generally, I am opposed to the codification of tort law because of the inadequacies of the codification process. Statutory gaps are inevitable. These gaps can be the source of great confusion which spawns litigation. Codification may also tend to freeze the evolving common law at a point that may not be flexible enough to deal with new developments. Further, codification involves political decision-making that tends to treat those actually injured as mere statistics and cannot weigh the real harm done to any particular individual.

State legislatures are, however, in a better position to "fine tune" common law development. Rather than attempting comprehensive statutory reform, the states may adopt specific statutory reforms to reduce the procedural complications inherent in complex, product liability litigation. An example of such fine tuning is the adoption of a comparative fault scheme (discussed in Question 15) which I have supported.

Question. You argue that diversity in the law of product liability is beneficial. How do consumers benefit by rules of law which are non-uniform and ever-changing?

Answer. Diversity in the law means that various schemes for allocating responsibility, compensating injured victims, and encouraging product innovation may exist at the same time. The differing jurisdictions serve as social laboratories among which one might compare reasoning and results. The common law is constantly

seeking a more equitable balance between the rights of consumers injured by defective products and producers. Of course, consumers also benefit from the innovation of new products; therefore, it is important that society be afforded the most efficient system for balancing these competing interests. S. 44 will freeze the law and thereby ignore the vast experience of the individual state jurisdictions. Diversity in the law maximizes the attainment of the societal values of safer products and product innovation because it provides a decision-making system that can deal with an ever-increasing number of contingencies in an ever-changing society.

Diversity also allows a state to establish standards of liability based upon the needs and policy goals of that state. If this country were a large, homogenous body with identical values and aspirations, uniformity might be a goal within itself. It is not. From the beginning, this country has been a union of states which joined together for common interests and are still free to reflect the differences among the states in, for example, standards of liability.

Question. Can you name an instance where the common law was replaced by a statute and, as a result, the law was more confused?

Answer. Yes. There are many examples. The example that comes most readily to mind is a situation that currently exists in Texas. Article 2212 existed in Texas long before adoption of § 402A of the Restatement of Torts. Tex. Rev. Civ. Stat. Ann. art. 2212 (Vernon 1971); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967). Article 2212a was adopted six years after the approval of strict liability for products in Texas and expressly prevails over Article 2212 "to the extent of any conflict." art. 2212c § 2(h). Article 2212 addresses the pro rata contribution for torts generally and Article 2212a seeks to compare negligence by allowing a modified, percentage allocation of fault.

Under Article 2212 a defendant's responsibility is pro-rated according to the number of tortfeasors. If three defendants are held liable, each is responsible for only 33 percent of the judgment. Of course, under traditional theories of joint and several liability each of the three defendants may be called upon to satisfy the complete judgment but would always have rights of contribution against his co-defendants for 66 percent of the judgment. Problems are destined to arise whenever one tortfeasor settles for an amount that is actually determined to be more or less than his pro rata share.

By applying the existing common law to Article 2212, the Texas courts permitted the non-settling defendant to treat the settlement as either a pro rata reduction or a dollar-for-dollar share of judgment after a judgment had been returned. See *Palestine Contractor's, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964).

In theory, Article 2212a sought to legislate the Palestine Contractor's Doctrine in the negligence context. In effect, Article 2212a has brought nothing but confusion to the law and has been a source of constant litigation seeking to unravel the complexities created by the statute. Article 2212a forces the non-settling defendant to choose between a dollar-for-dollar reduction or a percentage reduction even before the trier of fact allocates fault. See art. 2212a §§ 2(d)(e). Clearly Article 2212a changes the common law. Confusion is compounded whenever a defendant is liable under both strict liability and negligence theories or whenever one tortfeasor is held to be negligent and another is held to be strictly liable. Rather than solve the problems it was intended to solve, 2212a increases the difficulty of comparing causation because statutory language indicates that 2212a applies only to negligence while 2212 embraces remaining torts including strict liability. See *General Motors Corporation v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977).

Question. Would you oppose enactment of a Federal law defining and/or clarifying the liability of manufacturers for harms related to environmental pollution?

Answer. Yes. In an appropriate situation the federal government, of course, can directly regulate manufacturers as to environmental pollution. Violation of those regulations is a violation of federal law. I would oppose a federal bill which would impose upon the states mandatory standards of tort liability as an unwarranted intrusion into state common law and the state judiciaries.

Tort law is especially ill-suited to legislative intervention. As Dean Leon Green noted,

"Legislation usually covers too much or too little and is frequently couched in restrictive or ambiguous terms which the courts must modify and refashion to meet their needs. Moreover, it is more rigid and less subject to modification in view of change in either transactional or environmental facts.

"The time of legislatures is so absorbed with public affairs, budgets, police problems, provision for and regulation of public enterprises, taxation, and a score of other pressing problems that there is neither time, energy or interest left for the everyday problems of tort law. It is rare that tort legislation gets either the legisla-

tive ear or its approval unless it be supported by strong pressure groups who come with statutes already prepared and supported by persuasive advocates. It is hard to reduce the refinements of tort doctrine to statute form. About all that can be safely done is to give the courts direction by general terms and leave the refinements to be worked out through the litigation process. More frequently legislation in the tort field gives the courts more trouble than it gives assistance."

Green, *Protection of the Family Under Tort Law*, 10 *Hastings L. J.* 237, 246 (1959).

Question. S. 44 specifies a standard of strict liability of harms caused by products that are unreasonably dangerous in construction? Do you agree in the principle that this standard should apply in construction defect cases?

Answer. I agree with the principle that manufacturers should be held strictly liable for manufacturing defects that are a producing cause of harm. S. 44, however, abrogates the existing scheme of strict liability for manufacturing flaws by injecting a proximate cause standard as opposed to a "producing" cause standard. Often in products liability cases the product itself is destroyed making it virtually impossible for a plaintiff to prove proximate causation. See *Technical Chemical Company v. Jacobs*, 480 S.W.2d 602, 605 (Tex. 1972). Proximate cause differs from producing cause because it entails a consideration of foreseeability used in the determination of fault. "Fault" should not be a consideration in strict liability because it ignores the underlying rationale behind strict liability—that the manufacturer is in a better position than the consumer to prevent manufacturing defects and to insure against possible risks.

In addition to promulgating what is essentially a negligence standard for construction flaws, S. 44 provides additional defenses which abrogate the principles of strict liability. S. 44 would bar causes of action based upon manufacturing flaws where harm is caused by an unavoidably dangerous aspect of the product. Again, the bill focuses upon the negligence of the manufacturer or user.

Question. S. 44 specifies a standard of strict liability for harms caused by products that are unreasonably dangerous due to breach of an express warranty. Do you agree in principle that this standard should apply in express warranty cases?

Answer. I agree with the standard except for the requirement of the material fact relating to the safe performance of the product. Texas law holds a defendant liable if he makes a representation involving a material fact concerning the product's character or quality. Material fact is defined as,

"a fact that is important to a normal purchaser by which the purchaser may justifiably be expected to be influenced in making the decision to buy the product."

3 *State Bar of Texas, Pattern Jury Charges* PJC 71.06 (1982). The Texas standard follows that standard set out in § 402B of the Restatement (Second) of Torts (1965). While the distinction is somewhat subtle, I favor the Texas version. I would not favor the imposition of any standard upon the states by the Congress.

Question. I understand that you support state product liability statutes and that you have worked on a "comparative fault" statute in Texas for a number of years. Do you believe that a "comparative fault" statute is necessary to create uniformity in the law throughout the state of Texas?

Answer. The purpose of a comparative fault scheme (which I do support albeit not through federal intervention) is not to create "uniformity in the law." "Uniformity" as defined as "equal application of the law" exists with or without a comparative fault scheme in Texas. Comparative fault is merely a means of allocating responsibility among tortfeasors. Fault may be apportioned on a percentage basis or on a pro rata basis (given three liable defendants each is responsible for 33% of the damages.)

Currently, Texas is operating with two comparative schemes: one is for negligent tortfeasors (Article 2212a) and one is for strictly liable tortfeasors (Article 2212 as applied in *Palestine Contractor's Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964)). See *General Motors Corporation v. Simmons*, 558 S.W.2d 855 (Tex. 1977). Problems emerge whenever one tortfeasor is negligent and another is strictly liable. Different defenses are available to each according to his theoretical position. The negligent defendant may be immune from liability if the plaintiff's contributory negligence is greater than fifty percent of the total. I personally favor a pure comparative fault scheme that establishes a single defense of contributory negligence. I think the Texas legislature is perfectly capable of adopting such a measure without the assistance of the federal government.

Should the Texas legislature choose not to amend the present law, however, Congress should not interpret Texas' inaction as a cry for help. Indeed it is quite the opposite. Allocating fault in cases that are currently being decided under Article 2212 would require a reassessment of the rights of consumers and producers in Texas. Such decisions are better made by the political body more closely associated

with the populous whom the decisions will affect. Democracy is enhanced in this context when state legislatures are left free to determine the rights of their respective citizens. See discussion of legislative action and inaction in dissenting opinion in *Sanchez v. Schindler*, 26 Tex.S. Ct.J. 353 (April 27, 1983).

Question. If so, if approximately 70% of products manufactured in a state are sold outside of a state, then how could a Texas statute achieve uniformity for Texas manufacturers and sellers?

Answer. Again, a comparative fault scheme is not designed to "achieve uniformity" in the law. "Uniformity" if intended to mean "uniformity of results" is an unattainable goal in a system wherein each case involves different factual contexts. It would be impossible for a statute to assess differing levels of harm caused by differing types of products in differing sets of circumstances. Even with a national comparative fault scheme, a jury in Georgia may not allocate fault in the same manner a jury in Texas would. The facts may be only slightly different. The lawyers may be only slightly more effective. The court may interpret the statute in only a slightly different manner. And still the actual judgment could differ greatly from one state to the next. A comparative fault statute if adopted in Texas would simplify trial procedure in a products liability case and hopefully reduce the interpretive litigation spawned by existing statutory conflicts. The policy decisions made by each state should not be thwarted by vague attempts at such an ambiguous goal as "uniformity." Texas manufacturers who have so prospered under the fertile economic climate of this great state as to branch out their operations into neighboring jurisdictions subject themselves to the policy considerations that those jurisdictions have solemnly deemed important.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. Proponents of S. 44 suggest that a principal purpose of the bill is to reduce transaction costs and inefficiency. How does essentially eliminating the doctrine of collateral estoppel affect judicial efficiency?

Answer. Collateral estoppel is primarily a device used to enhance judicial efficiency based upon the prior adjudication of an issue or a claim. Elimination of that doctrine could only create a greater workload for the courts.

Collateral estoppel is currently being used in rather innovative ways. Texas has not yet adopted or rejected these uses. I believe strongly that Texas courts should be allowed to weigh the arguments on both sides and reach a decision rather than have our decision imposed upon us.

Question. Would you comment on your perspective on legislating at the federal level in an area of traditional judge-made law?

Answer. Federal preemptory legislation in an area of traditional common law by the states involves two distinct problem areas. First, the preemption of state law by federal law disturbs the constitutional compact between these levels of government. Second, legislation in an area of evolving common law eliminates the flexibility of the system while retaining as many uncertainties and ambiguities as previously existed.

As I discussed previously, I am very concerned about federal intervention into an area that has traditionally been left to the states and which reflects the policy determinations of each state. This bill strongly tends to abrogate the stated intention of the President.

"It is my intention to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people."

Inaugural address by President Reagan (January 20, 1982). One of the proper roles played by the states has always been the formulation of standards for liability in tort which reflects a state's policy decision as to compensation of victims and as to deterrence. S. 44 overtly usurps this traditional state role in our constitutional scheme and intrudes into the areas of contract law, insurance law and evidence law as well. While the magnitude of this intrusion is more than sufficient justification for the rejection of this bill, I am even more concerned with the precedent it sets. Virtually no aspect of modern life is insulated from interstate movement. The future of our system of enumerated federal powers with all other powers reserved in the states would be in grave danger.

I am opposed to a legislative codification of tort liability standards in general and of product liability law in particular. The common law system is one which can develop and improve itself but is well-based in the stability of previous decisions. The stability coupled with flexibility is necessary for the law of products liability which

is relatively new to the law in the modern form. I am quite disturbed by the prospect that this natural development may be halted if S. 44 is enacted. Further, the practical experience in areas such as FELA where legislation has replaced the common law has resulted in numerous inequities and well as severe hardship on the judicial system.

Question. S. 44 provides many new legal terms such as "practical technological feasibility" which are foreign to existing law. What guidance will this give courts charged with enforcing this law and would the codification of these new terms contribute to consistency and uniformity in the law?

Answer. The infusion of the many new legal terms and standards in S. 44 will largely mutate the purported goals of consistency and uniformity in the law. Standards for the "state-of-the-art" doctrine exist in the states today. Interpretation and application of the term "practical technological feasibility" may well take on the characteristics of existing state law. The desired uniformity will not be achieved and the United States Supreme Court will be left to resolve the differences. I do not believe that the Court will be able to do so. With the tremendous number of cases tried in the state courts and with the provisions precluding any new jurisdiction for the federal courts, the Supreme Court's burden will render the law ineffective or severely hamper the administration of justice by the Supreme Court.

Senator KASTEN. Justice Pope, we thank you very much for your participation here.

Our next witness is the Honorable Warren Eginton, U.S. district judge, the District Court for Connecticut. Judge Eginton.

Judge EGINTON. Thank you, Senator. I have a prepared statement that I have submitted, but I would like to make a few brief remarks that will not repeat what I said in the prepared statement.

I was confirmed as a Federal judge 4 years ago, in 1979, and have tried some industry product cases in that period. For two decades before going on the bench, I tried product cases exclusively.

My experience in those product cases, but more than that, my experience on the bench, prompts me to address your opening comment about the waste of judicial resources that you find endemic in the product liability situation as it exists now.

In addition to waste of judicial resources, I would talk about waste of client resources as well. It is axiomatic, I think, that if we are going to keep the load of the courts to a reasonable basis—and it is far beyond a reasonable basis now—we must do everything we can to encourage settlements as well as shorter trials. You cannot do that without certainty, or at least reasonable certainty, in the law that is going to be applicable to a given product case, because lawyers cannot settle a case if they do not even know what law is going to be applicable to the facts that are disputed in these matters.

I want to mention one case that is a horrible example, but, unfortunately, horribly typical, not horribly aberrational. I tried a case involving a private aircraft that had taken off from Texas and was due to go to Connecticut. The people on board the plane, a family, were from Connecticut.

The plane was using navigational maps made by a company in Oklahoma. The plane, for reasons that we never did get clear, was due into Dulles Airport as a stopping point on the trip, but decided to go into Martinsburg, W. Va. We will never know quite why, although the weather was pretty bad all around. The pilot was using a navigational chart that showed a complete IFR at Martinsburg, where in fact there was no glide path at Martinsburg at that time. The plane crashed.

The case came before me after about 3 or 4 years of discovery, and I found when I got the case that it was not ready to go on the merits because what had to be decided first was the choice of law. There were five States involved in the choice of law in this typical aircraft crash.

The lawyers had spent a great deal of time—not only their time but the clients' time and the clients' money—submitting briefs to me. I had spent a great deal of time, and it was a difficult decision to reach. My decision on the choice of law involved such issues as the difference in comparative negligence in these various States, difference in statutes of limitations and repose, difference in punitive damages and how they were to be applied. Some States do not have them at all.

So, you had issues that were very important to the lawyers and to their clients. They could not discuss settlement until those issues had been decided. My opinion was five times the length of the opinion on the merits that I eventually wrote on a motion for judgment notwithstanding the verdict of the jury.

So, it took my resources. It took their clients' resources and, of course, it has been appealed. The jury verdict and my decision were appealed to the Court of Appeals for the Second Circuit, so that at least three more judges will become heavily involved in all these issues of conflicts of law and whether I was correct.

So I applaud this bill, as I have said in my written paper to you, because it will reduce the waste of judicial resources and the waste of client resources insofar as it helps us develop certainty in the product area.

I will be happy to answer any written questions you submit to me, and you have my paper. Thank you.

[The statement follows:]

STATEMENT OF HON. WARREN W. EGINTON, JUDGE, U.S. DISTRICT OF CONNECTICUT

My name is Warren W. Eginton. On July 24, 1979, I was confirmed by the U.S. Senate to be a District Judge for the District of Connecticut and have been sitting continuously since that date at Bridgeport. My comments respecting Senate Bill No. S. 44 express my views as an individual. They are not presented in behalf of any organization of judges, and are not intended to reflect the views of any other of my judicial colleagues, either federal or state.

From 1960 through June, 1979, as a partner of the law firm of Cummings & Lockwood in Stamford, Connecticut, I represented clients in major product liability litigation, primarily conducted in federal courts throughout the United States. During those two decades I participated in aircraft accident litigation involving, among others, the crash of a United States Navy blimp, of a United States Army helicopter, and of a private helicopter as well as fixed wing aircraft. Other major product litigation involved incinerators and power plants located throughout the United States, and various categories of durable goods. The highlights of those cases were presented in detail to the Senate Committee on the Judiciary at the time of my confirmation in 1979. I was a founding member of the Product Liability Technical Committee of the American Society for Quality Control, and a member of the Product Liability Committees of the American Bar Association and of the Defense Research Institute.

My experience with product liability legislation, as distinct from litigation, began in 1970 with the issuance of the report of the National Commission on Product Safety chaired by Arnold Elkind, Esq. of New York. That committee included in its recommendations a principal conclusion that consumer legislation presented such a "hodgepodge of tragedy-inspired responses to challenges" that a federal presence was required to exercise "central leadership" with respect to the enactment of appropriate legislation on the state or federal level. Specifically, the commission con-

cluded as early as 1970 that there was "a need for a major federal role" in the development of product liability legislation.

My conduct of product liability seminars during the 1970's included instruction concerning the Consumer Product Safety Act and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. This led to a strong interest in the work of the Federal Interagency Task Force on Product Liability when that group was created in 1976. In Connecticut during the late 1970's I participated in a group representing all interested factions in the drafting and promulgation of a product liability act for that state. Connecticut enacted the first comprehensive state product liability legislation to be modeled after the Uniform Product Liability Act (UPLA), effective July 6, 1979. Unfortunately, the drafters of that legislation, including myself, ignored the warning prominently displayed when the interagency task force issued its comment draft in January, 1979. The task force recommended that state adoption await the final version of UPLA. However, the comment draft was the best then available, and so Connecticut adopted many of its major provisions, which were subsequently amended significantly in the final version of UPLA published in October, 1979.

Since 1979, and my role change from litigator to judicial officer, I have concentrated on a limited area of product liability litigation. I consider it proper for a judge to participate in discussions concerning product liability legislation, both state and federal, because of the obvious impact of such legislation on the conduct of a product liability trial. I have published papers, which are attached as appendices hereto, on UPLA, on S. 2631, the Product Liability Act introduced in the 97th session of the Congress, and most recently on S. 44, the current bill.

THE HISTORICAL FAILURE OF STATE LEGISLATION

When I met Victor Schwartz at an Atlanta seminar in 1979, there was no one in my experience more enthusiastic and dedicated than this then-chairman of the interagency task force. He spoke frequently and affirmatively in behalf of his comment draft and later in behalf of the final version of UPLA. Little did he or many others envision how difficult would be the task of promoting uniformity among the state legislatures in enacting this bill. The history of the Uniform Sales Act, followed by its successor, the Uniform Commercial Code, and the history of such uniform acts as the Uniform Reciprocal Support Act gave credence to the confidence expressed by Victor Schwartz. Many such acts had been adopted with effective uniformity by legislatures throughout the United States. Such was not to be the history of UPLA. It soon became apparent, as I have noted in an earlier paper attached hereto, that the complexities of drafting legislation that would be satisfactory to a plurality, let alone a majority, of the individuals and entities affected by the product liability explosion would prove insurmountable. At numerous seminars over the past three years I have encountered only a handful of panel members, coming mostly from academia, able to assume a dispassionate, reasonably objective view of the problems and the solutions. For the most part the rhetoric of opposing viewpoints made consensus impossible to achieve. In many instances the goals of some of the participants were too extreme to permit compromise. Surprising to some, the American Bar Association and large segments of the defense and insurance bars joined the strong attack on the legislation mounted by attorneys representing plaintiffs in product liability cases. Segments of the insurance industry were fragmented, as were manufacturers and large and small business entities. There is ample justification for the change of position taken by Victor Schwartz, who now concedes the failure of his legislative efforts to achieve uniformity in the various states, and who strongly favors the adoption of a national product liability act.

My own view, from the judicial standpoint, rests on a bias that uniformity is desirable. This in turn is based upon my years of experience in trying federal cases throughout the United States and finding that the uniformity of the famed Federal Rules of Civil Procedure simplified the burdens of trial and led to economies and reduction in transactional efforts that were significant to me and to the clients I represented. I have had the same experience on the bench with the Federal Rules of Evidence. I conclude that the more that uniformity can be accomplished throughout the states, either by national legislation or by uniform acts, the more quickly the litigation will flow and the lighter will be the economic burden on all parties involved. Certainly, the task of the judge and of the juries in understanding the problems and the rules of law to be applied to those problems will be greatly simplified by uniformity.

BENEFICIAL FEATURES OF THE FEDERAL PRODUCT LIABILITY LEGISLATION

S. 44 sets forth a goal "To regulate interstate commerce by providing for a uniform product liability law. . . ." In many important respects, that goal is accomplished by S. 44 as now drafted. The purpose of the interstate commerce regulation through this bill, as set forth in the Committee Report 97-670 is to create uniform standards throughout the 50 states, thereby reducing the burdensome transaction costs experienced in product liability litigation over the past two decades. In the following respects, in my judgment, the bill does provide clear and reasonable guidelines enabling parties to potential litigation to identify their rights and obligations, in turn facilitating settlement or providing a degree of certainty to the course of the litigation.

S. 44 is a positive step forward in at least five major areas in which uniformity has been notably lacking to date. In my judgment these areas are embodied in Sections 5(a) and 7 (which impose strict liability standards on the conduct of manufacturers as defined in section 4(a)(1) (A) and (D) relating to a product claimed to be unreasonably dangerous in construction or manufacture, or unreasonably dangerous because the product failed to conform to an express warranty of the manufacturer); in Section 9 (imposing a comparative responsibility standard); in Section 11(b), (c) and (d) eliminating all subrogation, indemnity and lien rights in workers' compensation litigation); in Section 12 (imposing a 25 year statute of repose, with significant prolonged exposure and manifestation exceptions); and in Section 13 (imposing punitive damages under definitive guidelines to the jury, with the amount to be determined by the court).

In all of the foregoing five significant areas, it is my judgment that the proposed legislation will establish clarity and uniformity, and will substantially reduce transaction costs, both direct and indirect, associated with product liability litigation to date. I perceive no negative aspects to any of those proposed sections of the bill, other than that I personally endorse the concept favored by many diverse groups, and incorporated into the Connecticut Product Liability Act in section 52-572r of the Connecticut General Statutes. In abolishing rights of subrogation or indemnity in Connecticut, the law provides that the worker's third party recovery from the manufacturer shall not be reduced by a percentage of fault of the employer, but only by the amount that the worker has received in compensation benefits. The interaction of sections 9, 10 and 11 in the proposed federal legislation will in many cases lead to the worker, who is often not able to control his conditions of employment, receiving less than the jury in the primary negligence suit had intended, even after deduction of any amount found proper because of comparative negligence of the employee. In reducing transaction costs (the primary reason for the unanimity on the abolition of subrogation liens), there results a built-in inequity in a few cases to one of the parties involved in the litigation. In my judgment, that entity is more appropriately the manufacturer than the worker. I concede, however, that this is a hotly disputed issue and in my judgment it should not interfere with the enactment of S. 44 insofar as Sections 9, 10 and 11 are concerned.

LEGITIMATE AND UNREASONABLE EXPECTATIONS CONCERNING S. 44

As I have noted above, I believe that the proposed federal product liability legislation will accomplish the primary goals of reducing transaction costs of all types and to all parties involved with product liability litigation. There is, however, in my judgment, one major area in which this legislation will have no effect on the cost of a product liability lawsuit. I have seen no proposed legislation sponsored by any organization that will minimize the need of the parties to introduce expert testimony as a critical portion of the evidence. In my commentary, attached hereto, on the original Uniform Product Liability Act as published in 1979 by the Federal Inter-agency Task Force, I used the acronym CEFEA to denote the legislation as the "Consulting Expert Full Employment Act." I do not envision that any of the noted experts specializing in product liability litigation will have to draw upon social security or any other pension or retirement benefits in the foreseeable future. So long as their health holds up, their prime concern will be to juggle airline schedules to meet deposition and trial attendance requirements.

The standards imposed by S. 44 in Sections 5 and 6 dealing with design defect and failure to warn are properly not strict liability standards, but there is legitimate debate as to what the standards are and what they might best be from the viewpoint of minimizing transaction costs and introducing certainty and clarity. I have found that most experienced trial attorneys and many judges adhere to the fault concept of negligence and undertake a balancing act when weighing the evidence in these critical areas of design defect or failure to warn. Early in the product liability

litigation explosion that followed *Henningsen v. Bloomfield Motors, Inc.*, 32 NJ 358, 161 A.2d 69 (1960) courts resurrected and frequently applied a balancing test known by the shorthand term "risk-utility" which seems to find its origins in an appellate decision of the Court of Appeals for the Second Circuit issued by the respected jurist Learned Hand in *U.S. v. Carroll Towing*, 159 F.2d 169 (2nd Cir. 1947). Obviously, employing the risk-utility approach or any other balancing act is bound to entail the uncertainty which experienced lawyers and judges realize is the price normally paid by any litigant entering the door of a courtroom in the United States. Indeed, the very basic uncertainty of litigation led on innumerable occasions in this century, long before product liability was addressed, in which the effort to impose certainty was made through the doors of the legislatures, both state and federal. It is hardly surprising that, given the compromise procedures inherent in the political process, seldom has legislation improved the situation from the standpoint of certainty or reduction of transaction costs. The debate over proper standards to be applied in the area of design defect and failure to warn is now raging at a very high level of intensity and activity. For a reasonably current and certainly comprehensive primer on this debate, I would refer to the article by Professor Aaron D. Twerski in Volume 57, No. 3 of the *New York University Law Review* for June, 1982 at page 521 wherein he discusses design defect litigation and the rules and standards which have been or might be applied to ascertain the existence of a duty and violation of the duty. I mention this article because of its comprehensively footnoted references to the proposals of other experts in this field, including illustrious academics such as Professors John Wade, Sheila Birnbaum, James Henderson, David Owen and George Priest, just to mention a handful of the many professionals toiling in this vineyard.

My own conclusion is that S. 44 should be enacted at this session of the Congress rather than be delayed further by continuing debate over the effectiveness of sections 5 and 6 in the design defect and failure to warn areas. The passage of time, and the involvement of the courts and the scholars, will almost undoubtedly result in modifications to the language of these sections, but that is not a persuasive reason for further tinkering at this time in the language of those sections, when consensus has proved for many legitimate reasons to be extremely difficult to achieve. My express warning to all of the parties involved in product liability litigation is that experts will have to be retained and will have to offer testimony as to many critical questions requiring a balancing under the language of this act. There will be earnest and, for the most part, sincere debate among these experts in any given case as to the application of the term "practical technological feasibility," not only as to the scope of that term in a given litigated matter, but as to the applicable technical, medical or scientific knowledge and the timing of the availability of such knowledge. There obviously will be testimony, as required by the act, with respect to what is economically feasible.

Although I see the "practical technological feasibility" area as a major battleground for the experts, this is not to slight the preliminary battleground, which requires that before the manufacturer is obliged to apply practical technological feasibility to eliminate the danger that caused the harm, the plaintiff must first prove that the manufacturer should have known that the danger existed, and in that contested area the issue is whether the pertinent knowledge is "reasonably accepted" in the professional community involved. This concept of professional acceptance has long been a battleground in product and professional liability areas of litigation, and certainly will continue to be so under the new act, or under any other type of statutory language that I can envision.

Sub-areas for expert testimony that will not pertain to all of the litigation, but to a certain percentage of it, is with respect to a product which is "unavoidably dangerous" in some essential aspect. This involves questions as to whether the unsafe aspect was so inherent as to be easily recognizable by the "ordinary consumer." Finally, alternative design requirements are such that most will concede that an expert challenging a product in a design defect case on the basis of alternative design possibilities will have to produce a working model of the alternative design if he is to hope to prevail before the jury or the court. All of this does not lead to short and simple product liability litigation. In this field, the litigation will for a major part continue to be complex and thus appropriate for handling under the Manual for Complex Litigation, as it has been in the past.

In conclusion, the same elements apply in the failure to warn area, but I would foresee less of a problem in that area, primarily because in my judgment it calls for a common sense determination by a jury of consumers. The reasonable man or woman on the jury has confidence that his or her judgment can bear with sound basis on a failure to warn case. Such is not the situation with design defect, where the testimony of the experts will often overwhelm and will almost always be vital.

So long as the parties are willing to recognize that in certain areas there is probably no legislation that can effect a cure, then I believe that there is a good possibility for more unity than now exists as to the necessity for national product liability legislation such as Senate Bill No. S. 44, which, on balance, I strongly favor from the viewpoint of a judge who would benefit from uniformity, both in the course of the trial and in the area of settlement before the trial has to commence.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Judge Pope stated in his testimony that at one time the Federal Employee Liability Act generated many cases in the U.S. Supreme Court. Isn't it true, though, that FELA is different from the Product Liability Act because it grants authority both to the federal and state courts while S. 44 grants authority only to State Courts? Would you care to comment?

Answer. Judge Pope probably selected the FELA rather than the Federal Tort Claims Act as his illustration, because the Federal Tort Claims Act differs from both the FELA and S. 44 in requiring the court to look to the provisions of state law whereas both S. 44 and FELA have superseded state law. However, there is a critical difference between the purpose of S. 44 and the purpose of FELA. FELA created in essence a new area of litigation. It eliminated any question as to whether employees would be handicapped in attempts to sue common carriers by any question of governmental immunity. It is certainly true that the FELA has generated a great deal of litigation. It was intended to generate litigation and to make that litigation uniform. I happen to regard the FELA as a great success and would be pleased if S. 44 were to do as well. My point is that the volume of litigation is neither going to be increased nor decreased by the provisions of any legislation such as FELA or S. 44. The happy effect will be that there will be some uniformity. The FELA blazed a trail of decisions that can be used with confidence with respect to S. 44 in that litigants wanted to test out the extent to which certain provisions of state law might still apply under the FELA. The decisions uniformly slapped them down and the FELA has been greatly strengthened by the decisions which have been issued by courts at all levels under that act. Accordingly, I would disagree with Judge Pope on the lesson to be drawn from the FELA but I would not accept the Subcommittee contention that the FELA differs from S. 44 solely because FELA grants authority to both federal and state courts while S. 44 grants authority only to state courts. Such a statement about S. 44 really is not true, so long as diversity jurisdiction exists in the federal courts. We will continue to handle many product cases unless and until diversity jurisdiction is abolished.

Question. Proponents assert that S. 44 will assist in reducing the time and expense of administering the judicial system. Could you speculate on the effect of a Federal product liability act on the administration of the judicial system?

Answer. As I stated in my prepared submission to the Subcommittee and in my oral testimony, the great benefit of S. 44 is in establishing uniformity in several significant areas. To the extent that the bill mandates a uniform approach by the states to the issues of a statute of repose, comparative negligence, punitive damages, and interrelationship between worker compensation and third party litigation, as well as establishing a single product liability action, the bill will reduce administration expense and time both in the state courts and in the federal courts which hear these cases. It is not correct to state that the bill will eliminate federal jurisdiction in product liability cases, because so long as diversity jurisdiction exists, federal courts will continue to hear as many of these product cases as they receive at the present time. As I pointed out with my *Halstead v. Salomey* illustration in my oral testimony, courts in some instances spend more time and effort dealing with choice of law issues than with the substantive issues of a product liability case. Lack of uniformity not only involves time and expense of court administration but also time and expense of attorneys, who of course ultimately bill their clients for such effort.

Although this question asked me to "speculate" on the effect of S. 44 on administration, I feel that my opinion is stronger than speculation. In fact, I would be willing to bet on its salutary effect on the administration of the judicial system.

Question. You are a Federal district court judge in Connecticut, a state which enacted a product liability statute in 1979. Many who oppose Federal product liability legislation, support state legislation. What has been your experience with the Connecticut statute?

Answer. My experience with the Connecticut statute as a federal judge is quite different from that of the state court judges that have dealt with the statute, although they have in many instances faced the same problems I face in each of my cases dealing with choice law. Since I worked with others on the original enactment of the statute in Connecticut in 1979, I am probably somewhat biased with respect to the baby that was produced, but I am aware of the criticism that we followed the UPLA first draft rather than the final draft and it is certainly true that we might have produced a better statute had we been able to wait for the final draft. Nevertheless, the statute in itself in my judgement is better than the conditions which existed prior to the enactment of the statute. The problem is that no other state adopted a statute exactly like the Connecticut version so that the lack of uniformity plagues me as it often plagues the state court judges when we have to take the Connecticut statute and determine whether it is going to apply or whether the statute of some other state or two or three other states will be applicable.

Question. According to a 1977 study, less than 20 percent of the goods manufactured in Connecticut are consumed in that state. Thus, Connecticut manufacturers are more often than not involved in product liability actions which occurred outside their home state. The Connecticut statute, is, then, of minimal value in providing clear and uniform guidelines to those whose business is conducted on an interstate scale. What is your feeling about this?

Answer. The Connecticut statute, and the Connecticut cases interpreting that statute, are of some value in providing clarity in those minute number of cases which happen to involve only the Connecticut statute. Unfortunately, most product cases in my experience are similar to my *Halstead v. Saloomey* situation referred to in my oral presentation to the Subcommittee, wherein no less than five different state statutes were involved and while each one was clear in what it meant to accomplish within its given jurisdiction, unfortunately there was no uniformity. In fact, this question points up why so many product cases end up in federal courts instead of in state courts, since diversity is easy to establish. The problem will be the same, however, for any state court which is faced with the problem I faced in *Saloomey* of becoming familiar with the laws of several different states in trying to determine which should be applied when they conflict as they all too often do conflict.

Question. Last year Mr. Bendorf of ATLA testified that the "crazy quilt pattern of diverse laws . . . is the manifestation of the health and vitality of the common law." What are your thoughts on this statement?

Answer. I do not understand Mr. Bendorf's statement, since common law has nothing to do with statute law. In my experience both as a trial lawyer over almost three decades and now as a judge for four years, the common law has been overwhelmed and almost completely submerged by statute law. In turn, the statute law evolved to a great extent from the creation of government administrative agencies starting with the Roosevelt administration in the 1930's. Statutes such as the Consumer Product Safety Act created a new federal agency with all of its body of administrative regulations, in turn leading to a litigation explosion that has little of anything to do with the common law. I find the health and vitality of the common law probably an irrelevant concern these days since judges have a great difficulty freeing themselves from statute requirements so they can apply the common law. If you are going to have statutes, I would prefer uniformity rather than diversity in the application of the statutes.

Question. Opponents of the bill suggest that it would stifle the courts in their efforts to mold the common law to meet evolving needs. Yet, in my opinion, the heart of S. 44 proposes guidelines which can meet evolving needs. What are your thoughts?

Answer. In my judgment, as I noted in response to the previous question, the common law is not so much molded by statutes as it is eradicated by statutes. My thoughts on S. 44 are, as I expressed them to the Subcommittee on April 27th, that in the area where it creates uniformity, it will be most effective in reducing transaction and administrative costs. The heart of S. 44 is contained in the sections that deal with the four principal areas of product liability litigation; manufacturing or construction defect, design defect, failure to warn, and express warranty. With respect to the first and the last, the strict liability standards are in my judgment appropriate and easy to handle. The failure to warn area lies in the common sense of the jury or the trier of the fact and again in my judgment creates very little problem, although there are many who disagree with me in that opinion. With respect to the major area of product liability litigation, the design defect area, I do not believe that the provisions of S. 44 will in any significant manner change the way in which courts and juries, whether state or federal, deal with these factual issues.

Expert opinion has always been required and expert opinion will continue to be required regardless of how the guidelines are phrased. In the expert testimony area, there is no legislation which in my judgment will reduce the litigation costs.

Question. Some suggest that a fault-based standard of liability could relieve a manufacturer of liability in a design or warning case if his conduct conforms to the conduct of the entire industry. They say that in such a situation it is impossible to prove that the manufacturer acted unreasonably. Would this be the result under S. 44?

Answer. Questions such as this one can be phrased so as to lean toward the position of persons favoring S. 44 or toward the position of persons opposed to S. 44. On this issue I am both neutral, as indeed I should be anyway, and indifferent because it does not bear upon my main reason for favoring S. 44, which is reduction in administrative and transaction costs connected with litigation. I do not happen to believe that the language of S. 44 dealing with design defect or failure to warn cases is going to change the way trials are conducted on these issues. The judges and the juries will continue to talk in terms of risk-utility balancing considerations, or even perhaps in Professor Twerski's new multiple-factor duty approach. I do not believe that any statutory language is going to change the basic common sense of juries of the issues the judges really consider. I cannot conceive of any jury or court relieving a manufacturer of liability in one of those cases solely because of evidence that the conduct of the particular manufacturer conformed to the conduct of an entire industry. That is only one of innumerable factors that will be testified to by the experts. In my judgment there will never be a situation where it would be impossible for a party to prove that a manufacturer acted unreasonably in particular case. Accordingly, I do not think that this would result from S. 44. I do not believe that the language of that bill is going to change the court and jury approach to design defect and failure to warn cases.

Question. Judge Pope believes that the Product Liability Act will generate considerable litigation because "it will submerge the United States Supreme Court in a sea of cases." Do you agree?

Answer. In my opinion the provisions of S. 44 will neither increase nor decrease the present volume of product litigation. What it will accomplish is to reduce the number of issues to be litigated by establishing uniformity as to those issues. For example not only did my *Halstead v. Saloom* opinion have to spend most of its pages dealing with choice of law issues, but my recent affirmance by the Second Circuit also found that court spending a considerable number of pages dealing with the choice of law issues that I had had to determine. I believe that I forwarded to Senator Kasten previously the *Halstead* opinions, but to make certain that you have them in connection with these responses, I enclose herewith my own opinion and the Second Circuit affirmance and you can see at firsthand how much attention was devoted to the choice of law issues by both courts.

The volume of product liability litigation is for the most part due to the abolition of the privity of contract requirement in *Henningsen v. Bloomfield Motors*, the 1960 New Jersey decision that I cited in my prepared submission to the Subcommittee. This legislation will not increase or decrease access to the courts by plaintiffs seeking redress on the basis of product injury claims.

Senator KASTEN. Judge, thank you very much. One of the things we are struggling with is to try to find examples that everyone can understand, of the problems with the system as it exists right now, and I think that you have given the subcommittee a good example of the kinds of problems and the waste of resources and of time.

Judge EGINTON. I will send you the decision in the *Halstead-Saloom* case so that you have that. It shows the conflicts of law issues.

Senator KASTEN. Judge, thank you very much. And also, the additional information that you discussed will be included in the record by reference.

Now, representing the Honorable Walter Floss, the Chief of Staff, Luke Rich.

Mr. RICH. Thank you, Mr. Chairman.

The Senator is in one of those circumstances that I know you are very familiar with. He is sitting on the floor of the Senate and

cannot get out of there. The majority leader has closed the House because we have some partisan problems these days. So, he sent me in his behalf.

I feel badly that I am here in place of him because not only does he have experience legislatively, but he has 35 years of experience in the commercial insurance business and has had an opportunity to watch the changes in product liability law over the years and its implementation.

Others today will have or soon will discuss various aspects of the product liability crisis in our country. What I would like to do is discuss one area of that lack of uniform Federal product liability law that have affected, at least, what Senator Floss thinks did not receive sufficient attention.

The changing nature of the world economy, and America's changing role in that economy, have been studied extensively. I am sure this committee has devoted many hours to this study, as have innumerable others—State governments, private sector, academia.

One of the conclusions that has broad acceptance is that this country still dominates the world in the area of technological innovation and improvement in the area of new technology development. Since Senator Floss also chairs the Small Business Subcommittee in the New York State Senate, he has spent a considerable amount of time trying to determine who are the innovators and new technology developers in our economy.

While we all know about the advances and discoveries that have come from Bell Labs, General Electric Research, IBM Labs, Kodak, and many other large companies, the evidence is that small business, most particularly the independent entrepreneur, produces most of the innovations and new technology developments in our country.

And what, you may ask, does all this have to do with product liability? I think I can best answer that question by giving a specific example. In Senator Floss' district in western New York there is a small company that has flourished manufacturing state-of-the-art instrumentation. During the late 1960's and the early 1970's, this company grew steadily, gained a national reputation in its specialized field.

The president and sole owner of the company decided to expand his operation and build an additional facility at his suburban Buffalo location in order to expand his export market to Europe, which was just beginning to grow. At about the same time these plans were being formulated, the company's product liability insurance coverage came due for renewal.

The insurance carrier inspected his company, informed the owner that his quality control record was excellent, workplace record was excellent, acknowledged he had never had a claim, but did tell him that his costs would have to go up a little. His current policy had a \$100,000 deductible and cost him \$16,000 per year. His new premium would be \$160,000 per year, a tenfold increase, and would carry a mere \$1 million deductible.

After the business owner recovered enough to say anything, he asked why. The answer was simple. You develop new product. Our actuaries have no way of predicting the potential for product liability actions against you. Then he went on to say that in some States

where his products are sold it is permissible to use advances in the state of the art as evidence that the original version of the product was unsafe or defective.

The fact that his products were constantly being updated, combined with a lack of a statute of limitations in many States on products actions, made him a very high risk.

The results of this astronomical increase in insurance costs were twofold. First, the owner decided that he would self-insure. Since the \$1 million deductible would break him anyway, there was no reason to pay \$160,000 a year for the privilege of going broke in a law suit.

Second, he decided not to build his new plant in Buffalo. Those 150 new jobs instead went to Israel. He formed a new company in Israel to sell to his non-U.S. customers. Why Israel? They do not recognize or allow product liability actions in Israel.

I review this rather lengthy case history because it exemplifies the problems that the lack of a good, equitable Federal product liability law poses. No. 1, by self-insuring, this small businessman has made his company and the jobs of all of his employees subject to the stroke of a judge's pen or a jury's decision. New jobs, badly needed in Buffalo, have been lost. Worse yet, the jobs went overseas.

Finally, and most importantly, this example points to the dampening effect that product liability insurance costs have on the inventive and entrepreneurial genius of our Nation. This businessman went to Israel. That is not what we want, of course.

But what about the scientist at the university, or engineer in his basement, who decides to go into business with his new product? What does he do when an insurance agent informs him that he cannot get coverage or it will cost him tens or hundreds of thousands of dollars to secure insurance coverage? I would suggest, Senator, that in too many cases he just gives up.

The world economy as it is, with the Japanese and Europeans breathing down our necks, we cannot afford unnecessarily impediments to be placed before the continued growth of the manufacturing sector in which we still lead the world, that of new technology.

To this end, last Monday the New York State Senate passed a resolution asking that Congress find a product liability solution on the Federal level. I read your bill. The Senator has read your bill. We know there will be changes in it, but we urge you to sit down with your counterparts in the House of Representatives, hammer out a bill that will result in, No. 1, lower litigation costs, No. 2, lower insurance costs, which we hope will lead to lower production costs, to a more competitive position in international trade and, most importantly, will remove the dampening effect that the current situation has on new technology and new product development.

I thank you for the opportunity to appear here. There is a statement that I have given to the clerk that will be submitted.

[The attachment referred to follows:]

PRODUCTS LIABILITY: THE TIME FOR ACTION IS NOW

* * * * *

FEDERAL ACTION

Of course, while New York companies must contend with our products liability case law, they also face differing laws in virtually every other state in which they do business. As a result of this situation, there has been considerable pressure for a uniform federal law which will transcend state laws and provide guidelines for the courts and the business community in the area of tort contract law, and product liability law. In order to meet this need, the U.S. Department of Commerce developed a Model Uniform Products Liability Act which it recommended to each state for adoption. Thirty-two states adopted some reform, but virtually none were as comprehensive as the Model Act. Senator Robert W. Kasten (R. WI.) Chairman of the U.S. Senate Sub-Committee for Consumers of the Senate Committee on Commerce, introduced legislation (S. 2631) which attempts to create a single Federal products liability law which would supercede the state laws now in existence.

This Committee is generally loath to recommend federal usurpation of state control on any issue. However, we believe that in the area of products liability law, some uniformity is required. We believe that the reduction in legislation and transaction costs, insurance costs, production costs, and increase in international trade, are well worth the trade-off of reduced state control in this area of law.

Litigation and transaction costs

Uncertainty about the law of products liability increases the costs of litigating a claim. Time and effort must be expended by all parties to determine what the applicable legal rules are. Further, the possibility that a court may adopt a new legal standard in a given case gives the parties the incentive to argue for adoption of a new standard which would aid their case. Parties may have to brief and rebrief the same legal arguments repeatedly. Because the law is unclear and because, even if it is clear, it may change, parties have great difficulty evaluating the merits of their case. As a result, it is difficult to come to a rational settlement decision. Parties therefore incur the costs of litigating claims which could have been settled to the satisfaction of all involved.

The litigation and associated transaction costs involved in investigating, pursuing, and defending a claim are a drain on productivity for manufacturers and product sellers. Legal costs are generally passed on to consumers in the form of higher product prices. These costs are by no means insignificant. According to calculations derived from a 1977 survey conducted by the Insurance Service Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs.¹ And for every dollar awarded to a claimant, he or she pays an average contingent fee of 38 cents in legal costs and therefore receives about 67 cents. Thus, one can estimate (adding the average defense cost to the contingent fee) that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant.

The testimony before the U.S. Senate Commerce Committee of a press brake manufacturer illustrates the magnitude of these legal and transaction costs:

"During the most recent fiscal year, our small company and its insurers paid out \$850,000 for products liability claims. But only 18 percent of that amount went to pay settlements to claimants. About \$700,000 went for defense lawyers and other transaction costs. I firmly believe that a uniform set of balanced product liability rules would have saved our company and its insurers over 60 percent of the \$700,000 we have expended. I also estimate that about \$100,000 of the above would result in savings because of uniformity, thus eliminating the current need for our attorneys to research and brief conflicting laws in 50 states in an effort to persuade courts to change or sustain particular rules of law.

"Second, many transaction costs will be eliminated, if the law is made more balanced and predictable. If everyone concerned—claimants, defendants, lawyers, judges, and manufacturers—know what the rules are, many claims without merit will never be started. Over the years we have lost only four verdicts out of the many claims that we have defended.

"We average over \$30,000 in defense costs on claims that proceed through trial. But we average about \$5,000 in investigating and defending each claim we receive, regardless of the eventual disposition. We settle many of these claims for relatively small amounts of money, because it costs less to settle them than it does to defend them in court. If claimants and their lawyers knew in advance that they would be

¹ Insurance Services Office Product Liability Closed Claim Survey. A Technical Analysis of Survey Results at 11 (1977).

required to prove fault in design and warning defect cases—and if there were a reasonable period of repose for average products—most of these claims would never be filed.”²

S. 2631 will benefit all parties and the economy by reducing unnecessary litigation and transaction costs. This will be achieved through the enactment of clear uniform legal standards and through a clarification of specific aspects of product liability law.

Insurance costs

Although the Risk Retention Act has eliminated subjective insurance ratemaking, the current uncertainties in the products liability tort litigation system contribute to the costs of product liability insurance. Insurance rates reflect the fact that manufacturers and product sellers are unable to predict the legal standards which will apply in future claims against them and the fact that the uncertainties create litigation and transaction costs. These insurance costs are passed on to consumers in the form of higher product prices. Enactment of uniform Federal product liability standards will, in the Committee's judgment, stabilize products liability insurance costs, primarily due to the reduction in litigation and transaction costs.

Production costs

Uncertainties in the products liability litigation system have an adverse impact on productivity. This is manifested in several ways. First, legal expenses involved in keeping abreast of variations and changes in the law, investigating and litigating a claim, divert resources from productive efforts. Similarly, excessive management time is diverted from production to the assessment of legal claims.

Second, uncertainties and variations in products liability tort law may deter the development of new products or product improvements. For example, manufacturers have justification for believing that evidence of product improvements may be used against them as evidence that an older product is defective. The result is clearly not in the best interests of the consumer.

Finally, businesses may eliminate a particular product line or terminate operations altogether if the costs of products liability exposure become too burdensome. As a representative of the Sporting Goods Manufacturers Association testified:

“Out of the 13 football helmet manufacturers, 7 remain in business . . . At present, the risk of doing business precludes being in business . . . Finally, Mr. Chairman, because of the fear of unwarranted products liability suits, liability insurance costs, and the economy's inflationary pressures, small and medium-sized businesses are hesitant to invest in new product research and development.”³

Enactment of uniform Federal standards applicable in all product liability cases will relieve some of these drains on productivity and the concomitant adverse effects on the economy.

International trade

Uncertainties in the products liability tort-litigation system have an adverse effect on international trade, a fact which affects the economy generally.

American manufacturers and product sellers generally pay products liability insurance rates which are 20 times higher than those in Europe.⁴ This disparity is attributable in large part to the uncertainties in the American tort litigation system. As a result of the disparity, American manufacturers and product sellers may be at a competitive disadvantage in both foreign and domestic markets. Insurers generally do not discount premiums where a manufacturer exports its goods, because there is always the possibility that a product-related suit will be brought in the United States. Thus, each U.S. product shipped abroad contains an insurance cost element greater than that of foreign competitors. Domestically, the effect of the current uncertainties in products liability law is similar. The price of imported products can be lower, because products liability insurance rates for those products are lower.

Enactment of uniform Federal Standards relating to products liability law will improve the competitive position of American business at home and abroad.

² Product Liability Reform: Hearings on S. 2631 Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, Serial No. 97-109, 97th Cong., 2d Sess. 14, 107, 115, 116-17 (1982).

³ Hearings on S. 2631, supra note 2 (statement of Maria Dennison, Director of Washington Operations, Sporting Goods Manufacturers Association).

⁴ See T. Marriott, “Product Liability and International Trade” Product Liability & Tort Law Reform, National Legal Center for the Public Interest at A-128 (April 21, 1982).

The current climate of uncertainty in products liability law imposes serious burdens on interstate commerce.

A Federal products liability law will reduce these burdens by achieving uniformity, because it will be applied by all courts in all products liability actions.

The enactment of this kind of law is within Congress' power to regulate interstate commerce. There are numerous examples of Federal legislation in areas where diverse State laws were deemed a burden on interstate commerce. The fact that products liability law is traditionally an area of state law does not alter the fact that Federal legislation in this area under the Supremacy Clause, can preempt state law.

The following is a summary of S. 2631, by Senator Kasten, as published in the Congressional Record. The Committee believes that this bill goes a long way toward solving most of the problems which have been outlined above.

Responsibility of manufacturers

In any products liability action, a manufacturer is liable if the claimant establishes by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product did not conform to an express warranty.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Mr. Bendorf of Association of Trial Lawyers of America testified last year that proponents of S. 44 "discharge the state legislatures as know-nothings." Would you care to comment?

Answer. Mr. Bendorf's attempt to set the state legislatures at odds with Congress is transparent. The question is not whether the individual states can produce good products liability laws; rather it is whether differing good products liability laws taken together create a solution to a national problem or merely to accelerate an already intolerable situation.

It is my opinion that the businesses of our nation would only be marginally better off with a whole series of "good" state laws. As you are well aware, there are a variety of proposals for solving the products problems. Some state's economics are dominated by durable good manufacturers, some by high technology new product oriented companies, some have a very large service industry and some depend on an agricultural base. Each state could write a "good" law for its needs and ignore the needs of business sectors that swell in their state but don't produce there.

This diversity cries out for one uniform federal law.

Question. Opponents of S. 44 suggest that there is no product liability problem and that if there is a problem, it is basically one attributable to the insurance industry. From your background in insurance and your understanding of small business, would you agree with this statement?

Answer. This is absurd. The insurance industry is a highly competitive industry, especially in the liability area. If they could offer products coverage at a lower rate, they would do so.

The factor that mitigates against these lower rates is the uncertainty that prevails in the area of products liability law. Insurance companies depend on actuarial data for their lifeblood. It is a practical impossibility to prepare accurate dependable data when there are no contents in an equation. (In this case, the lack of a uniform set of products liability laws among the states). This would not be a problem if products were sold and used primarily with their state of origin. Just the opposite situation occurs. The vast majority of manufactured goods are sold on an interstate basis.

It is my opinion that it is exactly this "insurance industry problem" that necessitates a uniform federal law.

In fact, many are sold on an Instructural Basis. Unfortunately, the cost of products liability insurance in the U.S. is 20 times greater than in Europe. Some businesses at the high end of these costs have only two choices; they can not sell to Europe or they can produce in Europe in order to be competitive. Neither of these alternatives generates jobs in America. I am aware of one such example from my own Western New York area about which I testified at your hearing.

Senator KASTEN. Luke, thank you very much.

As you may be aware, in the most recent meeting before the Small Business Committee, Senator Floss presented a resolution of the Small Business Advisory Council, which is a group of individ-

uals from across the country who are working with the Small Business Committee on critical and urgent problems to small business.

That resolution, which was presented by Senator Floss, was adopted supporting the enactment of Senate bill 44. So I thank you and I thank the Senator for introducing that resolution indicating once more the critical need of some way of addressing the kinds of problems that you so adequately described, especially with the idea of losing jobs in Buffalo and picking them up overseas.

The next witness on this panel is Professor James W. Jeans, the School of Law, University of Missouri in Kansas City. Professor Jeans is appearing at the request of Senator Hollings. We are pleased to have you with us, Professor Jeans.

Mr. JEANS. Over the years, Senator, there has been an insatiable quest for certainty through codification. Over 2,000 years ago, Jesus said, love thy neighbor, and it was a Jewish lawyer who said, who is my neighbor? He wanted a codification. And if he had been told that it was someone living within one mile, I am sure he would have sought for a codification of what the word love meant.

So there has been, over the years, and bringing the history a little more recently, at the turn of the century we tried to codify the worker's compensation law. We said that all we had to do was use simple words such as employee, such as accident, such as injury, and we would avoid the necessity of litigation.

Yet, if we look into the digest systems now, we will find that there are scores and scores of court decisions which are meant to interpret what seem to be simple words.

So in my judgment, it is fatuous to think that we can simplify this thing by trying to put it in black and white because tort law deals with contemporary standards as established within the community, and those contemporary standards, as Judge Pope indicated, cannot be frozen. If there is an attempt to freeze them, then we deny the growth of the law in whatever direction it might take, either in favor of the consumer or in favor of the manufacturer.

I would like to respond in the brief moments that I have to Mr. Connor's suggestion that there are no specific complaints about this bill and that it would cut down the need for any type of litigation.

Let's take some specific situations. Mrs. Connor goes to the store and buys some cream puffs for the family. She brings them home and everybody gets ptomaine poisoning. Under this present law, as it is written, there would have to be a court interpretation of whether or not there was coverage under a situation like that because there is no mention of any implied warranty as a grounds of liability.

Let's say Mr. Connor buys a new car, drives it for 1,000 miles and the wheel falls off and the car is demolished in the crash. Under the present law, there is no way of proving grounds of negligent construction through circumstantial evidence. No mention of a "res ipsa" type of a submission. There would have to be litigation before there could be recovery in a case like that.

Take a situation in which the *Tylenol* case, where the basis of it might be some improper packaging, the failure to use a childproof cap, let's say, on a bottle of 500 aspirins that a child ingests. There is no mention of the word "packaging" in the present law. There

would have to be a court interpretation before the person could be afforded recovery.

Let's say that a defunct manufacturer in Taiwan puts a faulty product on the market that is endorsed and advertised by some American industry. There would have to be court interpretation in order to get recovery under a situation like that because under the present law, advertisers and endorsers are not included as product sellers.

Let's take the way in which you have dealt with the problem of design. You say as the measure of care that we should not go to the reasonable person standard but to the reasonable manufacturer standard. Does that mean that manufacturers now fall within the same category as doctors, that a plaintiff would have the same burden as he has in a medical malpractice case, where it is not enough simply to have a doctor say that is not reasonable, but you have to have a standard where you say that no reasonable doctor would have done that, so that the manufacturers can establish their own standards? There would have to be court interpretation if we were not to fall into that same trap that we have now with professional malpractice cases.

And perhaps the most egregious problem of all in regard to this design theory of recovery is the fact that you say that there has to be reasonably acceptable scientific evidence before a designer is obliged to change a design.

What if there were a single technical journal which came out with the information that a baby formula, when mixed with canned milk, caused crib deaths? Would the manufacturer of that baby formula be able to keep producing that until a consensus developed?

If someone poked their head into this Senate hearing room and said that there was a bomb ready to go off, would we wait until four or five people confirmed that, or would we all leave the building?

That is the way the state of the law now reads. And I suggest that the persons who are drafting this law, despite their good intention, are overlooking the fact, number one, tort law, in order to serve community contemporary standards, cannot be codified.

Number two, by reducing the product seller as a defendant, it is going to force all these cases into Federal court, at a time when Federal courts are now seeking to divest themselves of diversity jurisdiction.

One of the primary reasons why good plaintiffs' lawyers join local product sellers is in order to get State court jurisdiction, and they won't be able to do that.

In the event that the philosophy is to continue with this type of a bill, there has to be an analysis based on hypothetical cases to find out just what would happen in a given case. And that is what I have endeavored to do in my written submission, and I would implore the committee to look it over, if you will. Thank you

[The statement follows:]

STATEMENT OF JAMES W. JEANS, SR., PROFESSOR, SCHOOL OF LAW, UNIVERSITY OF
MISSOURI-KANSAS CITY

A COMPREHENSIVE PRODUCT LIABILITY LAW IS NOT PROPER SUBJECT MATTER FOR
FEDERAL LEGISLATION

There are some areas within the law that demand certainty, predictability and stability. Areas such as contracts, estates, trusts and wills are designed in order that society may run smoothly and thus the need for black letter law that will provide us with the comfort of certainty as we endeavor to formulate business transactions, create long standing obligations and pass assets from one generation to another. Such custodial laws are compatible with codification.

Tort law serves a different purpose. It is more concerned that our society runs justly—not smoothly. It is an expression of contemporary community standards and, consequently, must be sufficiently pliable to adjust to changing concepts of civil liability. Tort law of necessity is painted in broad strokes. It deals with "the reasonable person," "ordinary care" and "reasonable foreseeability." The jury, composed of a representative group capable of expressing the contemporary community standards, is left to codify those concepts as they apply to the litigating parties. Such is the difference between custodial and remedial law.

But sometimes these differences are not readily recognized. Some two thousand years ago a great law giver enunciated a simple concept meant to remedy the relationships between humans. "Love thy neighbor," he said—and a Jewish lawyer (probably a scrivener of contracts and wills) said "Who is my neighbor?" He wanted the black letter law, a codification, a certain and definite expression of what his obligations were to be. Instead he heard the story of the Good Samaritan—which I am sure left him unfulfilled.

The existing body of product liability law has developed within each jurisdiction on a case to case basis and reflects the contemporary values of each jurisdictional community. The proposed legislation seeks to arrest that ongoing process and replace it with a set of rules which erodes the rights of the victimized consumer and freezes the universal and continual retrograde state.

The bases of liability of a manufacturer and product seller have been substantially narrowed.

A. THROUGH CHANGES IN THE SUBSTANTIVE LAW

Hypothetical. Defendant markets, for family use, lye in a quart bottle with a conventional screw off cap. A two year old finds the bottle beneath the bathroom sink and ingests the contents.

Question. Does the concept of an unreasonably dangerous design encompass the element of packaging so that a jury could find that the defendant was negligent in either failing to use a proper child proof cap or in offering the product for home use in an inappropriate amount?

Remedy. Include Sec. 4(a)(E) "the manufacturer failed to exercise reasonable care in the marketing or packaging of the product".

Hypothetical. Defendant designs an airplane which, at the time of the design and government certification, was thought to be safe. Following an air disaster caused by "wind shear" it is discovered that the plane cannot withstand foreseeable wind shear forces. Defendant markets the plane, it crashes due to wind shear killing all the passengers and crew?

Question. Inasmuch as Sec. 5(b) confines the issue of design adequacy to the time of manufacture or certification, will claimant be permitted to introduce evidence of reasonably accepted technical knowledge learned later—but before the sale?

Remedy. Revise Sec. 5(b) by striking lines 21, 22 "at the earlier of the time of manufacture or government certification of the product" and inserting "at the time of sale or release for use by the consuming public".

Revise Sec. 2(8) by adding "or Sale" in line 20 after the word "manufacture".

Hypothetical. The manufacturer of a highly caustic herbicide provides a manual for use of its product to all licensed crop dusters. The herbicide is sent to the farmer whose farm is to be sprayed. There are no warnings on the containers, only directions to dilute one part herbicide to one hundred parts water. Seeking to use some of the spray on his garden, the farmer exposes himself to the caustic fumes and suffers blindness.

Question. Does a warning to a "supervising expert" adequately advise other foreseeable victims of the hazards? Will this provision eliminate the use of product inserts for prescription drugs?

Remedy. Strike Sec. 6(d)(1)(B).

Hypothetical. A dozen cream puffs are purchased from a local bakery and are consumed by a family, all of whom are stricken with food poisoning.

Question. Under what theory of recovery may the victims proceed? Has the traditional implied warranty of fitness with its attendant ease of proof been eliminated as a theory of recovery?

Remedy. Revise Sec. 4 to include "F. the product was unreasonably dangerous because the product did not conform to an implied warranty of fitness for the use for which it was intended".

B. THROUGH CHANGES IN THE TRADITIONAL METHODS OF ESTABLISHING PROOF BY CIRCUMSTANTIAL EVIDENCE.

Hypothetical. A safety belt worn by a workman painting the Golden Gate bridge breaks and the worker falls to his death. The belt is never recovered or the wheel of a newly purchased automobile comes off and the auto is completely destroyed in the resulting crash.

Question. Inasmuch as claimant is unable to produce evidence to support any of the codified theories of recovery, will he be foreclosed from recovery? Are the traditional concepts of *res ipsa loquitur* to be denied the victim of a faulty product?

Remedy. Revise Sec. 4(b) and Sec. 8(b) to read "Proof of facts from which it may be inferred that the product failed as a result of some defect in the product will suffice to support a finding of liability."

C. THROUGH CHANGES IN THE STANDARD OF CARE IMPOSED UPON THE MANUFACTURER AND PRODUCT SELLER

Hypothetical. Defendant manufactures a heart monitor device which does not have an audible warning when the rhythm becomes critically erratic. Such warning systems are available for use and feasible but no one in the industry utilizes them.

Question. Must an injured claimant adduce proof from someone within the industry as to what a reasonable manufacturer would have done? If defendant adduces proof from all the competing manufacturers that they follow the same practice, does this not foreclose further consideration? Will there be a "conspiracy of silence" within the ranks of the manufacturers?

Remedy. Revise Sec. 5(b) and Sec. 6(c)B by substituting "person" for "manufacturer".

Hypothetical. A scientific journal reports that the hundreds of crib deaths that occur annually are the result of excessive salt in defendant's powdered baby formula which when mixed with canned milk can be fatal. Defendant's own medical research staff disputes the claim. Defendant refuses to change the formula or revise its warnings. Claimants' child is fed the formula with canned milk and dies.

Question. Inasmuch as the scientific report was that of a single researcher and not "reasonably accepted" in the scientific or medical community will claimant survive a motion to dismiss the claim? Will the law abandon the traditional balance of magnitude of harm, likelihood of occurrence and cost of remedy to determine the reasonableness of defendant's conduct? Can a product manufacturer or seller ignore scientific warnings (regardless of how catastrophic the results) until a consensus develops?

Remedy. Revise Sec. 5(b)(1), Sec. 6(b)(1) and Sec. 6(c)(1)(A) by striking "based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimants harm" and revise Sec. 5(e)(1) by striking "based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the alternative design."

D. THROUGH NARROWING THE IDENTITY OF POTENTIAL DEFENDANTS

Hypothetical. Underwriters Laboratory endorses an electrical appliance which has numerous dangerous features. Claimant relies on the endorsement and purchases the appliance. Its dangerous features cause claimant to be injured. The manufacturer is beyond the jurisdiction of the court.

Question. Should a commercial endorser of products whose business is designed to advise consumers of the safety and desirability of products be immune from civil liability when they make negligent assurances resulting in injury to the consumer?

Remedy. Revise Sec. 2(11) to include "endorsers" "advertisers".

**PROPOSED CHANGES IMPOSE UPON THE CONSUMER VICTIM AN INCREASED RESPONSIBILITY
FOR HIS OWN CONDUCT AND THE CONDUCT OF OTHERS.**

Hypothetical. Claimant is a teenage hispanic with a limited knowledge of English and a limited education. She is representative of a class which constitutes fifty percent of the market for defendant's product. The warnings on the label are such that they are incomprehensible to the claimant. She uses the product contrary to the warnings and is injured.

Question. Should the efficacy of a warning be judged objectively or subjectively? If communication depends on the ability of the receiver to comprehend the message can the law ignore the identity of the reasonably foreseeable user?

Remedy. Revise Sec. 6(b)(4) by striking "a reasonably prudent" line 9 and inserting "the."

Hypothetical. The lawn mower which claimant purchases has a twenty page manual which includes in its instructions the following. "Users should inspect the area which is to be mowed and remove all rocks and other foreign objects." While mowing the lawn a rock is struck and claimant is injured.

Question. Should a jury be instructed that misuse has occurred when an "instruction" is ignored? Can a manufacturer arbitrarily define misuse simply by mandating plaintiff's behavior through an "instruction?"

Remedy. Revise Sec. 10(a)(2) by striking the word "the" line 10 and inserting "reasonable."

Hypothetical. Claimant attempts to remove the lid of a liquid cement can with the aid of a putty knife. A portion of the knife chips off and lodges in claimant's eye.

Question. Is the traditional test of "anticipated use" to be abandoned and the responsibility of the manufacturer for the performance of its product to be measured by the reasonableness of the claimant's conduct?

Remedy. Revise Sec. 10(a)(2) by striking "reasonable practice of users" line 11, 12 and inserting "reasonably anticipated use."

Hypothetical. Before using his lawn mower claimant notices a crack in the housing. While mowing, the blades strike a rock which strikes the housing shattering it and injuring claimant. Although the defect was apparent, claimant had no knowledge that there was a risk that the housing would shatter.

Question. Should claimant be penalized for his inability to recognize and appraise a risk which is beyond his level of comprehension?

Remedy. Strike Sec. 10(c)(2)(A). Revise Sec. 10(c)(2)(B) by striking "and voluntarily used the product or" line 20 and insert "and knew of the risk involved in using the product in such defective condition and".

Hypothetical. Claimant is injured by the combined fault of a manufacturer and the failure of an employer to train the product user. A jury finds that the damages suffered were \$100,000 and that the employer, who is financially irresponsible, was fifty percent at fault.

Question. Should the injured claimant be denied the usual benefits derived from the responsibility of joint tortfeasors and recover less than the damages suffered?

Remedy. Revise Sec. 9(b)(2) by adding after the word "conduct" line 3 "of claimant" Revise Sec. 10(a)(2) by striking everything after the word "product" line 12.

Hypothetical. Claimant is riding in an automobile which has been "couped up" to increase its speed. While driving at a fast speed, over claimant's protest, the brakes fail because of a defect and claimant is injured. The driver is financially irresponsible and not joined as a party.

Question. Should the usual laws of joint and several liability be abrogated to reduce the financial responsibility of the negligent manufacturer?

Remedy. Revise Sec. 10(b)(1) by striking "any person other than the defendant manufacturer or product seller other than". Revise Sec. 10(2)(A) by striking "a person other than the manufacturer or product seller" and inserting the word "claimant". Revise Sec. 10(2)(B) by striking "product user" and inserting the word "claimant".

**THE CLAIMANT BEARS AN INCREASED RISK OF THE FINANCIAL INSECURITY OF THE
MANUFACTURER OR PRODUCT SELLER DEFENDANT**

Hypothetical. The claimant receives a judgment against multiple defendants one of which has adequate insurance to satisfy the entire judgment. The others have no insurance and are located in foreign jurisdictions.

Question. Is the law of joint and several liability to be abrogated in order to favor a guilty defendant at the expense of the injured claimant?

Remedy. Strike Sec. 9(d) and insert "Each defendant shall be fully responsible for the judgment rendered in favor of claimant. If a defendant is obliged to satisfy a judgment in excess of his proportionate share, such defendant may seek contribution from other judgment debtors to the extent of their proportional share."

THE REQUIREMENT THAT THE CLAIMANT EXHAUST HIS WORKER'S COMPENSATION REMEDY BEFORE PURSUING A CAUSE OF ACTION AGAINST THE MANUFACTURER OR PRODUCT SELLER CREATES UNDUE BURDENS WHICH MAY JEOPARDIZE A FAIR RECOVERY

Hypothetical. Claimant is injured by a defective product in his work place. The employer disputes the nature and extent of this injury and the ensuing litigation takes three years. In the meantime the defective product is lost, a critical witness dies and others forget essential elements of the incident.

Question. Must the product claim be delayed until final disposition or will the purpose of the legislature be served if the execution of the judgment is deferred until the respective obligations of employer and manufacturer are determined?

Remedy. Revise Sec. 11(a) by striking lines 15 through 19 and the phrase "until those remedies are exhausted" and insert "Any judgment secured against a manufacturer or product seller in which the claimant is eligible to file a claim for worker's compensation shall not be executed upon until either the claimant or his employer has exhausted their remedies under an applicable worker's compensation law."

CERTAIN PORTIONS OF THE PROPOSED LEGISLATION ARE IN ARTFULLY DRAFTED AND WOULD ENCOURAGE INTERPRETATIONS CONTRARY TO THE PURPOSE OF THE PROVISIONS

Hypothetical. A real estate developer offers a stuffed toy to every family who attends an open house in a new subdivision. The toy, manufactured by a bankrupt company, contains metal shavings which cause the death of a two year old child.

Question. Will the product seller's identity as "a seller of real property" immunize him from liability in distributing a defective product?

Remedy. Revise Sec. 2 11(A) by striking that paragraph and revise Sec. 2(10) by adding in line 11 after the word "organs;" the word "real estate."

Hypothetical. A pharmacist provides a prescription drug manufactured by a foreign drug company incapable of being served. The drug contains a foreign ingredient that is poisonous.

Question. Does the legislation seek to immunize all professionals in such cases or is it meant to avoid the application of product liability law to prosthetic devices, such as contact lens or dentures, provided by a professional?

Remedy. Revise Sec. 2(10) by adding "devices supplied by a professional health care provider which are incidental to the professional services rendered."

Hypothetical. The claimant suffers severe injuries by reason of a defective product. The manufacturer has insurance coverage of \$100,000 but no other resources. Claimant seeks to join the product seller who has ample resources.

Question. Inasmuch as the manufacturer can satisfy a judgment of up to \$100,000 will the judge permit the product seller to be joined?

Remedy. Revise Sec. 8(e)(2) by striking it and inserting "the court determines that the resources of the manufacturer are such that an anticipated judgment could not be collected. In the event that a judgment against a manufacturer is not satisfied in full an action may be instituted against a product seller or sellers in the amount of the unsatisfied portion of the judgment rendered against the manufacturer."

CONCLUSION

The proposed legislation severely penalizes the victim of a faulty product in every conceivable fashion possible:

By changing the substantive law through: Eliminating certain causes of action; eliminating certain wrongdoers as defendants; eliminating traditional obligations of joint tortfeasors; increasing the obligations of the injured victim; limiting proof of defendant's errant behavior; and

By changing procedural law through: Inhibiting the process of a claim against the errant manufacturer or product seller when the injured victim has a worker's compensation claim; limiting the choice of party defendants thus limiting the choice of venue; and

By jeopardizing the ability to secure a judgment against a financially viable defendant through: Limiting the joinder of potential defendants; delaying the institution of a product claim while a worker's compensation claim is pending; imposing

upon the victim the proportionate share of liability of a judgment-proof third party wrongdoer.

The legislation should be defeated.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. I understand that you are opposed to a federal statute creating uniform standards of product liability. Assuming a federal law is enacted, do you believe that manufacturers' conduct in design defect cases should be judged by a "negligence" (i.e.—"fault-based") standard or a strict liability test? Why?

Answer. In determining liability for defective design a negligence standard, in my judgement, is more equitable than a strict liability test. Of necessity a design decision must incorporate a consideration of those same factors which determine negligence: magnitude of the harm, likelihood of the harm occurring, ease of prevention and social utility. It is unrealistic to appraise the "defectiveness" of a design without permitting proof that a safer design would make the product unfunctionable or unmarketable.

Question. Do you mean to say that every time a body of common law is displaced by a statute there is more uncertainty? For example, is there more uncertainty in the case of the UCC or the Federal Rules of evidence?

Answer. Statutes which incorporate words or phrases which have no history of legal interpretation are destined to pass through a period of uncertainty until those terms have been interpreted in their legal context. Witness the litigation prompted by the need to interpret such simple terms as "injury," "accident" and "work related" in the Worker's Compensation Statutes.

Assumed in the question is the desirability of having certainty in areas of tort liability. There is no question that in matters of commercial transactions predictability and stability are needed. In matters of tort liability there are some who prefer to abide by contemporary standards of fairness within the community even at the sacrifice of certainty.

Question. Do you know of any instance in the legal history of the United States where the common law was replaced by statute and, as a result, became more uncertain, more complex, and more confusing?

Answer. Yes. Worker's Compensation Law provides such an example. Compare the amount of litigation that has arisen in this area with that under the F.E.L.A. (which, on the whole, retained the common law elements of recovery) and it will be seen that codification did not remedy the problems of uncertainty.

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. S. 44 provides many new legal terms such as "practical technological feasibility" which are foreign to existing law. What guidance will this give courts charged with enforcing this law and would the codification of these new terms contribute to consistency and uniformity in the law?

Answer. Phrases which are used consistently in the law are subject to review through the appellate process and over the years their definitions become refined and they become terms of art. The incorporation of new legal phrases in the legislation necessitates that individual trial judges, uninformed by existing appellate decisions, provide their individual interpretations of the new phrases. The result will be a lack of uniformity and consistency until the refining process is completed through extensive litigation.

Question. Judge Eginton discussed the Connecticut product liability law. Have you had any experience with any of the state statutes such as Connecticut? Does this demonstrate a need for a federal bill?

Answer. Shortly after the State of Connecticut enacted its all inclusive Product Liability Act I was invited by the State Judicial Conference to review the bill and confer with the trial judges of the state concerning its application in the courtroom. An entire day was spent identifying the areas that demanded interpretation and soliciting the opinions of the judges as to how the law would translate to the reality of the courtroom. It was the consensus that the attempt to simplify the law through statutory codification had failed and that the need for interpreting the various provisions of the act would increase litigation.

Senator KASTEN. Thank you, Professor. Not only will we look it over, but we will include it as part of the record.

Also, we would be anxious to work with you on some of the questions you have raised because we don't in any way want to be pushing things into Federal court from State court, and that is not the intention of the legislation. It is frankly not most people's interpretation. In your Tylenol example, the package for our consideration would be a product, and it wouldn't fall into the areas that you are talking about.

Did you mean to say that every time a body of law, a body of common law is displaced by a statute, there is more uncertainty? In other words, is there more uncertainty in the case of the Uniform Commercial Code, the Federal Rules of Evidence or other kinds of things?

Mr. JEANS. No, there are certain areas within the law which are custodial areas of the law, such as wills and trusts, where we need certainty, we need predictability. We do not need certainty nor predictability in tort law. In view of the number of circumstances that can arise, we are thrown into the area of dealing with such vague concepts of reasonable care, ordinary care, reasonable persons, and that is all that it can do. That is all we can deal with.

Senator KASTEN. Well, I am not a lawyer. That wins votes in most audiences. But my understanding of the Uniform Commercial Code is that it doesn't have very much to do with wills or the other kinds of examples you just picked out.

Mr. JEANS. Contracts.

Senator KASTEN. We will struggle through this, but we would be anxious to work with you because some of your interpretations are significantly different than interpretations that other experts have had before the panel.

Mr. JEANS. That is the point.

Senator KASTEN. So we will be anxious to try to work with you in terms of ironing out some of these questions.

Judge, you are in the Federal district court in Connecticut, and your State enacted a product liability statute in 1979. Many people, and we heard a couple of them earlier today, who oppose Federal product liability legislation support State legislation, or at least say they support State legislation.

What has been your experience with the Connecticut statute?

Judge EGINTON. Well, I have had to write two decisions on it. Dennis Connolly, who is in the room now, and I had a great deal to do with the input on the Connecticut bill. The Connecticut bill was done early in the game. It was done on Victor Schwartz's first draft of the Uniform Product Liability Act, which as you know of course, better than many Senators, was changed before the act was sent out for final hopeful adoption by the States.

Connecticut has done some things that I think are good in our bill. Our comparative fault concept and the interaction with worker compensation I think is pretty well done there. But our problem is—let me give you one concrete example of what bothers me.

In your bill you have a 25 year statute of repose. I think that is very desirable, compared to the Connecticut bill which has a 10 year statute of repose, plus an additional year under certain cir-

cumstances. Your exceptions for manifestation and cumulative effect I think are very good.

My concern is that the States have gone all over the lot on this statute of repose, for one example, and all over the lot on comparative negligence and how it interacts with worker compensation. It is a lack of uniformity that creates the problem.

Senator KASTEN. So the fact that you have enacted the law in Connecticut really hasn't helped? You would agree with some of the points that some people earlier have made that 70, 75 percent, whatever, of the products that are made in Connecticut are in fact used in some other place other than Connecticut, and you get into that same overall problem?

Judge EGINTON. Yes. My experience with product cases as a judge shows that it doesn't make any difference where that product happened to be manufactured. It is whether the State has some connection with what finally happened because the involvement of the user or component part manufacturers, things of that sort, give you the problems. You don't know which State act you are going to apply.

Senator KASTEN. Professor Jeans, isn't it true that a negligence or a fault-based standard of reasonable care applies to actions involving—you listed a number of professions in your comments—but that fault-based standard of reasonable care, my understanding is that it applies to engineers, to architects, to lawyers—

Mr. JEANS. Yes.

Senator KASTEN. To doctors, which was your example, and just about everyone. Why, then, are you suggesting that that standard somehow would not be applicable to manufacturers?

Mr. JEANS. I think that it is a bad standard. Let me give you a quick example.

I represented a parent of a child who was killed when she was given paragoric at 1 week of age. I talked to the best doctors, pediatricians, in the Kansas City area and they said it is true that now we know that children under 2 should not be given paragoric. I asked whether he would testify and say that this doctor then was negligent in prescribing that drug for such a young infant. He said no because 50 percent of the doctors still do it. I know it is wrong; the good doctors know it is wrong, but the standard of care by the law is whether or not a reasonable doctor would have given paragoric, and I cannot testify to that.

And that is the frustration that we find. We would rather have that issue given to a jury to find out whether a reasonable person would have prescribed paragoric, knowing what all the medical testimony was, rather than having the doctors establish their own standard of care.

Here we would be allowing manufacturers to establish their own standard of care, and I suspect if I were a judge I would have to have a manufacturer take the stand and say, "I would not have done it that way." And I don't like the idea of there being elitist groups within our society who are able to establish their own standard of care, whether that elitist group is a doctor, a lawyer, an engineer, or a manufacturer. It is just a difference of philosophy.

Senator KASTEN. Gentlemen, we have other questions that we intend to submit for the record. I very much appreciate your testimony here today.

Our next panel will include Professor Larson and Mr. Fark. The first witness on this panel is Prof. Arthur Larson of the School of Law at Duke University. Professor, we are happy to have you with us.

STATEMENTS OF PROF. ARTHUR LARSON, SCHOOL OF LAW, DUKE UNIVERSITY; HOWARD FARK, EXECUTIVE VICE PRESIDENT, MINSTER MACHINE CO., MINSTER, OHIO, ACCOMPANIED BY JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION

Mr. LARSON. Thank you. I deeply appreciate this opportunity to comment on one portion of S. 44, which is the portion having to do with the relationship between products liability and workers' compensation. This is a not insignificant part of the problem, as I understand it, because the plight of the products manufacturer and distributor that we have been hearing about this morning is substantially exacerbated by the fact that in most States he cannot pass on any part of this cost to an employer who might have been a great deal more negligent and at fault than himself.

The typical situation runs something like this, or at least the typical most extreme case problem situation. Suppose you have an employer who is 80 percent negligent. He buys a machine; he tinkers with it. He removes the guard. The manufacturer, let's say, was 20 percent negligent in some way.

An employee is injured. He sues the product manufacturer and recovers 100 percent of his damages. The typical story from then on is: He restores to the employer so much workers' compensation as he has been paid, and the employer comes out even. But in some cases the employer is subrogated to the employee's rights, and you have the curious prospect, in the eyes of most people, of the 80 percent negligent employer suing the 20 percent negligent products manufacturer and recovering, reimbursing himself and passing the excess on to the employee.

Well, this is one of the oldest problems in compensation law. When I wrote my treatise and published it in 1952—and I have about 300 pages on this—the opening sentence is: "This is the most evenly balanced controversy in all compensation law." That has been quoted dozens and dozens of times because it is the only thing you can say with confidence about the subject. Everything else from that point on gets pretty confusing.

The classical solution to this day still is, in the majority of States, to give priority to the exclusiveness defense of the employer. So he comes off not only scot free, but he reimburses himself. The products manufacturer is left holding the bag. This strikes a lot of people as unfair, and it does contribute to the severity of the products problem.

Struck by the unfairness of this, a number of courts and some legislatures have tried to tinker with this and cut the baby in half in some way, and the results have been consistent with that general approach of cutting babies in half. The result has usually caused

more problems, as in New York, as in California, as in Illinois, as in Minnesota, and a number of other States that have tried to find some equitable compromise.

Finally, about 2 or 3 years ago, I began proposing what seemed at the time a very drastic solution, but extremely simple. In all cases, whether the employer is negligent or not, reduce the employee's recovery against the third party products manufacturer by the amount of his workers' compensation. Abolish subrogation by the employer against the third party. Abolish any kind of or any prospect of recovery over by the third party against the employer. That is it. And that is basically what S. 44 has adopted.

There is just one modification, however, that I would like to mention. Section 10 of the bill provides that the products defendant's liability shall in all cases be reduced by an amount represented by the fault of any other person, and that of course would include the employer.

I think that spoils this picture because, first, the employer's fault would once more be injected into the products suit, and second, it would mean that the employee's own recovery, in some cases, would be reduced substantially below what he gets now. If his own employer's negligence, let's say, was 80 percent, he would get a great deal less than he does now in his final recovery.

Thank you.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS THERETO

Question. S. 44 would in effect postpone several liability of joint tortfeasors by making each defendant liable only for his share of the damage award unless the court determines that part of the damage award is not collectable from a particular defendant. Would you comment on this result?

Answer. Not within the scope of my testimony, which was confined to workers' compensation aspects of S. 44.

Question. Do you believe that S. 44 provides the best approach to deal with workplace product injury or would a federal worker compensation system provide a better approach?

Answer. Yes. I am emphatically opposed to a federal workers' compensation system.

Question. Would you comment further on your testimony regarding employees' fault? Should employees bear the cost of the employer's fault through the workers' comp effort?

Answer. Employees should not bear the cost of the employer's fault in products liability actions, and would not do so under S. 44. In relation to the products liability defendant, the employee would of course bear the cost of his own fault. But the employee's fault would not, of course, diminish his workers' compensation rights.

Senator KASTEN. Professor Larson, thank you very much. As you know, I am not sure we have been working directly with you, but we have been drawing on your law journal article in great detail, trying to work out this compromise in this area, and we are enthusiastic about the compromise and we believe that we are going to be able to work this out for all of the affected parties.

You heard Mr. Gold I guess talking about some of the problems in this area. I am hopeful that we are going to be able to do it.

We thank you. We have been drawing in large part on your ideas based on that one law journal article.

Mr. LARSON. I might add, I am in the rather happy position of being relatively noncontroversial in that the American Bar Associ-

ation, although it doesn't like your handiwork in some other respects, approves of this part, and the same is true of the American Insurance Association.

Senator KASTEN. Well, we are doing pretty well with the bar association. We have at least a significant number of people in the group that are now actively supporting the bill basically in its entirety. There are a small number that aren't on board yet.

The next witness is Mr. Howard Fark. Mr. Fark is the executive vice president of the Minster Machine Co. in Minster, Ohio, and he is accompanied by Mr. James Mack.

Mr. Fark, we are pleased to have you with us today.

Mr. FARK. Thank you, Mr. Chairman.

We are here this morning to express our strong support for S. 44, which will restore certainty, fairness, and most importantly, balance to the tort litigation system. We will focus our comments this morning on those provisions of S. 44 which pertain most directly to the industrial workplace.

Under current law in most States, a negligent employer may, solely at the expense of the third party manufacturer, avoid entirely the cost of an industrial accident, an accident for which the employer has, in most circumstances, been partially or completely responsible.

Employers, unlike manufacturers, are in a unique position to control a workplace environment. They are responsible for seeing that equipment is properly maintained and safeguarded, and they are responsible for adequately training employees in the safe use of industrial machinery. When they fail to exercise their responsibilities, their employees are injured and our members pay the bills.

For example, a man in Ohio is missing four fingers and most of his right hand because his employer altered the original design of our machine and then ignored the claimant's request that a guard be installed on that machine. Our original design or the employer's installation of a guard following his alteration of the machine would have prevented that injury.

In Minnesota, a man's right arm and wrist were crushed when caught in one of our presses, which had been modified by his employer. We had no control over the installation of the new system.

A substantial portion of my own company's product liability claims are directly linked to the inequitable subrogation system. For example, we recently expended \$17,000 in defense costs on a Rhode Island subrogation case filed by an insurance carrier even though the injured worker refused to go to trial. The trial judge ultimately dismissed the lawsuit.

Section 11 remedies this imbalance. The employer, in exchange for giving up his right to pursue a subrogation lien under 11(b) receives through 11(c) and (d) substantial reinforcement of the immunity shield traditionally afforded by the workers compensation system. The claimant's total award is not affected, since 11(a) merely codifies current law and practice.

We understand that the insurance industry has indicated that the reduction in transaction costs brought about by the adoption of section 11 would help reduce and stabilize insurance costs for sellers of workplace products.

Sections 9, 10 and 11, taken as a whole, go a long way toward restoring long-overdue balance to product-related claims which arise in the industrial workplace without harming the workers compensation system.

Turning now to the statute of repose, our company has recently defended product liability claims relating to machinery we manufactured as long ago as 1926. Our defense of these claims, while successful, has resulted in substantial legal expenses. Of the 24 closed claims involving products more than 25 years old which our company has defended, none has resulted in judgments against us, and only a handful were settled as a matter of holding down defense costs, the largest settlement being \$3,500.

Now as a matter of common sense, if a piece of heavy machinery has operated without incident for over 25 years, how likely is it that the original builder is responsible for an accident involving that equipment? It is virtually certain that the accident is due to product misuse, alteration or employee fault.

What the statute of repose does, as a practical matter, is to put an end to our legal costs incurred in battling over these issues concerning old and tired products.

Clearly, Mr. Chairman, the case has been made. Federal product liability legislation is needed now. In 1982 our company spent \$459,000 in legal and investigative costs, a year in which there were no jury verdicts decided against us. We commend you for recognizing the seriousness of the product liability problem and the necessity for a fair and effective solution in the form of a uniform Federal law. We urge this committee to approve S. 44 without delay.

[The statement follows:]

STATEMENT OF HOWARD FARK, EXECUTIVE VICE PRESIDENT, MINSTER MACHINE CO.,
REPRESENTING THE NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION

INTRODUCTION

Good morning, my name is Howard Fark. I am Executive Vice President of the Minster Machine Company, located in Minster, Ohio and Beaufort, S.C. The company manufactures mechanical power presses and currently employs approximately 500 persons. (During periods of peak production, the company's employment capacity is closer to 900 persons.) I am appearing this morning on behalf of the National Machine Tool Builders' Association (NMTBA), a national trade association comprised of approximately 400 member companies which account for more than 85 percent of United States machine tool production. Accompanying me today is James H. Mack, Public Affairs Director at NMTBA.

NMTBA genuinely appreciates the opportunity to appear before this Subcommittee and discuss the product liability crisis which confronts our nation's economy. As you know, Mr. Chairman, product liability is of critical and overriding concern to the nation's machine tool builders. Therefore, we are heartened by the substantial progress which was achieved last year toward Senate passage of a uniform product liability law—progress which culminated in this Committee's approval of the Product Liability Act (S. 2631), favorably reported on October 1, 1982. Mr. Chairman, we commend your patience and perseverance with regard to this important issue, evidenced by your prompt re-introduction of the Product Liability Act (S.44) in January of this year. We are hopeful that S. 44 and these hearings will lead Congress to a speedy and successful resolution of the serious (and worsening) product liability problem currently faced by manufacturers and consumers alike.

Before proceeding with our comments on S. 44, I would like to offer a brief overview of the domestic machine tool industry and where it is today. NMTBA represents those in the business of manufacturing the tools of metalworking productivity, including cutting, grinding and forming machines, universal measuring machines,

and automated production systems. Although the industry is relatively small by some corporate standards, America's machine tool builders account for a very basic and strategic segment of the nation's industrial capacity—this is the industry that builds the machines essential to our military readiness and our ability to respond in the event of a national emergency.

For the U.S. machine tool industry, 1981 and 1982 were years of retrenchment. Orders, shipments, and employment each dropped dramatically. For example, shipment declined about 30 percent—from \$5.1 billion in 1981, to \$3.6 billion in 1982. Because net new orders fell by 50 percent last year, the industry's shipments will be substantially lower in 1983.

Unfortunately, at a time when the U.S. machine tool industry is struggling to regain its competitive edge, product liability is working against our ability to compete fairly and effectively in the international marketplace. Let me share with you why this is true.

Foreign machine tool manufacturers often sell the bulk of their goods in countries other than the United States. However, they have now substantially penetrated the American market. In 1982, about 30 percent of the dollars spent by American industry for machine tools went for imports—one out of eight dollars went to Japan. (This level of import penetration is particularly alarming when you consider that the foreign share of our domestic machine tool market is increasingly comprised of more technologically advanced and militarily significant equipment.)

Part of a machine tool manufacturer's cost is product liability insurance. As with any other cost, it is factored into the price of products. But, because the United States is only a partial market for foreign machine tool builders, and because product liability rules in foreign countries are much less cumbersome and significantly more defense-oriented than in the United States, the product liability costs of foreign machine tool builders are substantially less than those of domestic machine tool manufacturers.

Perhaps more importantly, our product liability insurance costs are affected by our older products. Under product liability law today in the majority of states, our potential liability for products is endless—literally "forever." We can cite you cases where products that are 30, 40 or even 50 years old have been the subject of product liability lawsuits. While we usually win these suits, they result in high legal and transaction costs. Insurers know this, and factor it into our premiums. Foreign machine tool manufacturers, on the other hand, do not have product liability exposure on their older products, because their penetration has been relatively recent. Therefore, their product liability insurance costs often are substantially less than ours.

Thus, whether we are competing abroad or domestically, the foreign machine tool manufacturer is at a decided price advantage because of the relatively lower cost of product liability that must be factored into product prices.

A uniform federal product liability law would allow us to compete more effectively with foreign manufacturers in this country and abroad.

THE NEED FOR A FEDERAL UNIFORM PRODUCT LIABILITY LAW HAS BEEN FIRMLY ESTABLISHED

Perhaps more than any other legislative proposal with which we are familiar, S. 44 is the product of meticulous, long-range study and ongoing compromise. During the Ford and Carter administration, the Federal Interagency Task Force, headed by the Department of Commerce, identified and examined virtually every aspect of the complex problems affecting interstate commerce which have resulted from the current state-by-state approach to product liability law.¹ And, the need for and composition of fair and balanced product liability reform was extensively reviewed in the House of Representatives during the 96th Congress.

Hearing before this panel in March, 1982 established the interstate nature of the product liability problem and the need for a federal solution. The Committee heard from a variety of parties, including consumer representatives, the organized bar, manufacturers and other product sellers, the Administration, and several noted tort law academicians.

Several pertinent conclusions emerged from the March hearings. First, the chaotic, helter-skelter nature of product liability tort law has produced a litigation

¹ For a more detailed account of these initiatives, see, generally, Interagency Task Force Final Report, U.S. Department of Commerce (1977). See, also, U.S. Congress, Senate Committee on Commerce, Science and Transportation, Statement of Emmett McCarthy, Vice President, Product Reliability, Dreis & Krump Manufacturing Co. (representing NMTBA), March 12, 1982 before the Consumer Subcommittee (97th Cong., 2nd Sess.), at 20-22; S. Rep. No. 97-670, 97th Cong., 2nd Sess. (1982), at 10.

system plagued by uncertainty, imbalance, and unpredictability. Because the rules determining the liability of product sellers for product-related injuries have been developed almost exclusively by judges on a case by case basis, they vary from state to state, sometimes resulting in direct conflict. Because products are distributed nationwide, instability in the law acts as a formidable impediment to interstate commerce. Although a manufacturer may have facilities in only one state, his or her product may be sold throughout the country via numerous distribution networks. The law applicable in the manufacturer's home state only affects product liability claims arising there—it does not affect claims which may arise in the other 49 states.

Consider, for example, the plight of a manufacturer who attempts to provide an adequate warning concerning the safe use of a product which may be distributed for nationwide sale. The majority of states generally recognize that consumers have a responsibility to use products in a safe manner and that manufacturers should not be required to warn against obvious dangers which a reasonably prudent person should be able to discern and avoid. Nevertheless, product sellers are faced with an untenable situation in which they are liable in some states if they do not warn against obvious dangers, and are liable in other states if they do (because these courts believe that warning about obvious dangers "waters down" the effectiveness of more necessary warnings).²

Manufacturers face similar uncertainty with regard to product design standards—a design determined to be "unreasonably dangerous" in one state may well pass muster in another. Some states, such as California, do not even require a showing that the product was unreasonably dangerous. All of this increases both legal and production costs. Consumers ultimately shoulder the costs in the forms of higher product prices. And, in some instances, disparity in the law may limit the consuming public's access to innovation and product safety. Traditional tort law, for example, has prohibited the plaintiff from using evidence of the defendant's new safety improvements in his or her products to show that the design of older products was unsafe. This rule has recently fallen by the wayside in a few states. A rule which permits evidence of subsequent remedial measures to be introduced in a product liability claim involving an older product may deter manufacturers and product sellers from taking such measures, because they may legitimately fear that the introduction of such evidence will affect them adversely in court.³ When asked to illustrate this by example, manufacturers are placed in a dilemma—providing examples may subject them to further liability.

In addition, a growing number of state courts have expanded the concept of strict liability (liability without fault) to include product design cases. (A very few states have extended this expansion to include warnings.) Where their actions may be judged without regard to whether they were negligent (or "at fault"), manufacturers face considerable disincentives to improve the design or safety of their products.⁴

In addition to its adverse effect on interstate commerce, uncertainty in the law of product liability has also resulted in transaction costs which are intolerably high. Unquestionably, the cost of resolving product-related claims has risen sharply in recent years—due largely to lengthy litigation over applicable rules of liability. For example, machine tool builder Emmett McCarthy, appearing before this panel last March on behalf of NMTBA, made this startling disclosure: "During its most recent fiscal year, my own small company and its insurers paid out \$850,000 on product liability claims. But only 18 percent of that amount went to pay settlements to claimants—about \$700,000 went for defense lawyers and other transaction costs." Indeed, the American Insurance Association has cited estimates that for every 66 cents an injured claimant receives, 77 cents goes toward legal expenses. As noted below, this is a factor in rising insurance costs. It also explains why segments of the organized bar (but not all lawyers) are opposed to the enactment of S. 44. The bill would substantially reduce legal costs.

² Section 6(d) (2)(A) of S. 44 codifies the majority view and does not require warnings against dangers that are obvious—a provision which increases the likelihood that warnings against hidden or less obvious dangers will be heeded.

³ Section 14 of S. 44 reflects the view currently held by the overwhelming majority of states—evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible. This provision comports with rules 403 and 407 of the Federal Rules of Evidence and is based on the rationale that such evidence is not relevant to the issue of liability, because liability should be judged at the time the event occurred rather than at some subsequent point in time.

⁴ S. 44 avoids this undesirable result by establishing a fault-based standard with regard to responsibility for harms caused by a product's allegedly defective design or formulation or by alleged failure to warn of product hazards.

Uncertainty in the tort litigation system is also reflected in product liability insurance rates, which have been noticeably erratic during the past decade. Insurers, like the product sellers they insure, are unable to accurately predict potential liability due to the disparity in state laws. Consequently, their rates are set conservatively to cover a "worst case" situation. In some instances, the rates are so conservative that product sellers are precluded from obtaining affordable coverage.⁵ Without insurance, product sellers may be bankrupted by a single product liability judgment—or worse, injured claimants may have no way to fully recover their damages.

Thanks to this Committee's initiative and the leadership of Senator Kasten, the insurance aspect of the product liability problem was addressed by the passage of the Risk Retention Act of 1981 (P.L. 97-45), designed to provide an equitable market solution to the problem of affordable product liability insurance coverage. The Act facilitates the ability of product sellers to form self-insurance groups and purchase commercial insurance on a group basis. This additional competition in the insurance market will help ensure that product liability rates, now and in the future, will be determined on an accurate basis. However, the ability of businesses to self-insure is only a partial, albeit important, solution to the overall problem of affordable, available coverage. As long as the scandalously high transaction costs associated with product liability lawsuits continue (and they will—as long as there remains a wide variance in and among state laws), and as long as some jurisdictions continue to impose liability on product sellers in design and warning cases without proof of fault, insurance costs will remain inordinately high.⁶

And, as we mentioned earlier, international trade has been hindered by the rapid evolution of new and varying legal theories resulting in increased liability exposure to those who manufacture and distribute products. A clear illustration of the negative impact on trade can be seen in a comparison of product liability insurance rates—American manufacturers and product sellers routinely pay premiums which are 20 times higher than those paid by their European counterparts.⁷ The competitive disadvantage is obvious. American products destined for overseas markets are necessarily priced to reflect insurance costs which vastly exceed those of foreign competition; here at home, the price of imported products can be lower because the product liability insurance rates for those products are lower.

The March 1982 hearings established a sound and compelling basis for Senator Kasten's introduction of S. 2631, the Product Liability Act. This panel reconvened last July, again hearing from a broad cross-section of interests, each expressing their respective views concerning S. 2631—legislation which was preceded by the wide circulation for public comment of several staff drafts. The July hearings provided an opportunity for further legislative refinement. Both sets of hearings, coupled with this Committee's approval of the legislation last October,⁸ laid the necessary groundwork for Senator Kasten's re-introduction of the bill earlier this year.⁹

NMTBA has endorsed the legislation as a fair and workable solution to the product liability problem.¹⁰ Because machine tools are confined exclusively to use in the industrial workplace, we will focus our comments this morning on those provisions of S. 44 which pertain most directly to the workplace environment.

THE EFFECT OF THE WORKERS' COMPENSATION SYSTEM ON THE LAW OF PRODUCT LIABILITY

Product-related accidents can essentially be divided into two categories—consumer accidents and workplace accidents. Because work-related injuries comprise a con-

⁵ During the peak of the product liability insurance crisis in the mid-1970's, approximately 25 percent of NMTBA member companies were unable to obtain affordable coverage, and thus were "running bare" during that period.

⁶ Our members report that on the whole, the price of product liability insurance premiums has stabilized—and in some cases, come down—in recent years. This is undoubtedly due to the lucrative investment market fostered by high interest rates. As interest rates decline, insurance costs, will rise. Given the uncertain nature of tort law today (which is decidedly more chaotic than in the mid-1970's), the cost of product liability insurance has the potential of reaching record high levels. Accordingly, we can anticipate a return to the precarious days when one-fourth of NMTBA member companies were completely without coverage.

⁷ See, T. Marriott, "Product Liability and International Trade," *Product Liability & Tort Law Reform*, National Legal Center for the Public Interest, at A-128 (April, 1982).

⁸ See, generally, S. Rep. No. 97-670, 97th Cong., 2d Sess. (1982).

⁹ S. 2631, as reported by the Senate Commerce Committee on October 1, 1982, and S. 44, as introduced on January 26, 1983, are identical bills.

¹⁰ See, generally, U.S. Congress, Senate, Committee on Commerce, Science and Transportation, Statement of William W. Scott, Executive Vice President, V&O Press Co., Inc. (representing NMTBA), July 1, 1982 before the Consumer Subcommittee (97th Cong., 2d Sess.).

siderable portion of all product liability litigation,¹¹ the workers' compensation system necessarily comes into play. As a result, what we have in the workplace is the collision of two trends of legal theory: workers' compensation—a self-contained no-fault system under which the injured employee is assured statutorily prescribed benefits;¹² and traditional product liability tort law—a reparations system based on the concept of responsibility for fault.

Problems have arisen because these two very different systems come into conflict virtually everytime a workplace accident occurs. The following explanation tells why:

"The injured employee can file a claim under his state's workers' compensation program, but the amount of his recovery is specifically limited by statute. However, while he is barred by [most] statutes from bringing a lawsuit against his employer, he may seek additional recovery by bringing an action against a third party such as the manufacturer and/or seller of the machine or other product by which he was injured. The ability of the product manufacturer or other third party to defend himself and to seek to bring the employer into an action is directly controlled not by common law principles of negligence or strict liability, but by the workers' compensation statutes of the state in which the suit is brought. The interaction of these two systems—product liability and workers' compensation—directly affects the total costs and the allocation of the costs of the workers' compensation system."¹³

Our discussion this morning will document that this interaction between the two systems has resulted in an unfortunate situation characterized by egregious imbalance, excessive transaction costs, and—most alarmingly—substantial disincentive for employers to provide and maintain safe working conditions.

Section 11 of S. 44 deals effectively with these problems in a straightforward and equitable manner. NMTBA is confident that the approach fashioned by Section 11 will enhance workplace safety and significantly reduce current litigation costs without diminishing an employee's right to collect workers' compensation benefits or to recover in a product liability claim against a third party. In addition, we understand that the insurance industry has indicated that the reduction in transaction costs brought about by the adoption of section 11 would help reduce and stabilize insurance costs for sellers of workplace products. We believe, therefore, that as an essential element of S. 44, Section 11 merits our careful analysis this morning.

Subsection 11(a): Prevention of double recovery

Subsection 11(a) codifies the effect of existing law in virtually every jurisdiction by ensuring that an injured employee does not receive "double recovery" through a combination of workers' compensation benefits and the award of damages in a product liability lawsuit. This provision would apply only in those cases where a potential for double recovery exists—that is, in cases where the dollar amount of worker compensation benefits exceeds the dollar amount of damage attributable to the conduct of third parties and/or the claimant.¹⁴ In such cases, the amount of workers' compensation benefits is simply subtracted from the claimant's total damages.

It is important to clarify that subsection 11(a) does *not* in any way alter the amount of workers' compensation benefits due an injured employee, nor does it affect the employee's ability to recover damages for a product liability claim. Most important, it is simply a codification of current practice in virtually every state.

¹¹ The Insurance Services Office (ISO) study on closed claims revealed that 42 percent of the dollars paid out by insurers stemmed from work-related incidents, although these incidents comprised only 11 percent on the claims.

¹² The social policy which initially prompted the establishment of workers' compensation benefits was based on a trade-off: in exchange for surrendering the right to sue his employer in tort, the injured employee receives payments pursuant to a set compensation schedule based on the nature and degree of injury. Thus, workers' compensation replaced the costly, time-consuming, and often uncertain tort litigation process with an administrative remedy assuring, in most cases, that an injured worker will receive adequate compensation for injuries sustained in the course and scope of employment. Compensation is guaranteed regardless of who may have been at fault, including the injured worker. The third party defendant did not enter into the original scheme, because when workers' compensation was first negotiated in the early 1900's (and for many years thereafter), privity requirements and other contractual prerequisites generally prohibited injured employees from bringing product liability claims against a manufacturer or product seller. It was not until much later that most states had abandoned the privity rule. The interaction of workers' compensation and product liability tort law is, therefore, a fairly recent development.

¹³ Weisgall, "Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties," 1977 Wisc. L. Rev. 1035, 1036 (1977).

¹⁴ The calculation set forth in subsection 11(a) ties in closely with findings made by the trier of fact under Section 10 of S. 44, discussed *infra*.

Thus, it does not reduce the total amount of reparations currently available to injured workers. We support the double recovery language as a fair provision which merely prevents an unintended windfall.

We also support the portion of subsection 11(a) which provides that a product liability claim arising from a workplace injury shall be dismissed without prejudice in the event that a claim for workers' compensation benefits has not been filed or the remedies under the applicable statute have not been exhausted. It will help assure an accurate determination of the amount of the subrogation lien by the appropriate forum—the worker compensation board. NMTBA believes that this provision is an important step toward ensuring that the interaction between the two systems will be appropriately kept at a minimum.

Subsection 11(b): Eliminating the subrogation lien

The "egregious imbalance" of which we spoke earlier is best typified by the subrogation lien, a vehicle through which an employer who fails to maintain a safe workplace can pass along his workers' compensation costs to a product manufacturer. In most jurisdictions, the subrogation lien goes into effect regardless of employer fault. Before discussing subsection 11(b), we feel that a brief overview is in order so that the impact of this provision can be readily appreciated.

Typically, subrogation works like this: The employee first receives worker compensation benefits from his employer and then may bring suit against a third-party—usually the manufacturer of the equipment which is involved in the injury. Subrogated to the employee's tort claim is the employer's claim for recoupment of the amount paid out in compensation. In most states, the exclusive-remedy provision of the workers' compensation statute precludes the third-party from an action against a negligent employer for contribution or indemnity, so that the third-party pays the entire damages and the employer pays nothing.

The result is blatantly unfair: a negligent employer may, solely at the expense of the third-party manufacturer, avoid entirely the cost of an industrial accident—an accident for which the employer has, in most circumstances, been partially or completely responsible.¹⁵

There is no question that the subrogation lien has fostered excessive legal costs. Commenting on the mechanics of the loss-shifting process, one observer has noted that third-party suits (including subrogation claims) are primarily "sources of income for attorneys."¹⁶ And, as NMTBA witness Emmett McCarthy told this panel last March: "Over 80 percent of our claims are initiated or stimulated by the inequitable subrogation system."

The subrogation lien poses another major concern as well—that of workplace safety. Employers, unlike manufacturers, are in a unique position to control the workplace environment; they are responsible for seeing that equipment is properly maintained and safeguarded, and that employees are adequately trained in the safe use of industrial machinery. The subrogation lien, which permits a negligent employer to pass along the costs of an industrial accident to a third-party manufacturer who exercises little or no control over the circumstances under which the accident occurred, clearly acts as a disincentive to workplace safety by shifting the focus away from accident prevention where it will do the most good—in the workplace. As one commentator has recently observed:

"The third-party manufacturer may be able to bear the loss but should not because the real ability to control the safety of the work environment rests with the employer. This is one of the most critical faults of the present overlap between products liability and workmen's compensation. If injury is to be prevented, *the one who is in fact able to prevent the loss must have an incentive to prevent it*, and frequently this is the employer rather than the manufacturer or seller."¹⁷ (Emphasis added.)

From NMTBA's perspective, what all this adds up to is a situation in which unsafe work practices in unsafe workplaces, maintained by unsafe employers, are causing working men and women to lose fingers and hands—or worse—and *our members are paying for it.*

¹⁵ The ISO claims study indicated that 57 percent of the dollars paid out by insurers in work-related incidents involved situations in which employer fault was a factor. The actual number of claims involving employer fault would be much higher, since substantial dollar awards are normally paid in cases involving clear (and sole) manufacturer fault.

¹⁶ Davis, "Third-Party Tortfeasors' Rights Where Compensation-Covered Employers are Negligent—Where Do Dole and Sunspan Lead?," Vol. 4 Hofstra L. Rev. 571, 585 (1976).

¹⁷ Carpenter, "Products Liability—An Analysis of the Law Concerning Design and Warning Defects in Workplace Products," 33 S.C. L. Rev. 278, 292 (1981).

Subsection 11(b) eliminates the unfair, unsafe and expensive results of the subrogation system by prohibiting the employer (and its worker compensation insurance carrier) from pursuing a subrogation lien, except where the manufacturer or product seller has specifically agreed to hold the employer faultless. This provision does not affect an injured worker's ability to recover either workers' compensation benefits or a product liability damage award. It simply makes clear that the costs of the workers' compensation system will be paid by the employer—as was originally intended—and not by the tort litigation system.

We believe that subsection 11(b), when viewed in the context of section 11 as a whole, strikes an equitable balance. The employer, in exchange for giving up his right to pursue a subrogation lien, receives substantial reinforcement of the immunity shield traditionally afforded by the workers' compensation system. As noted below, it is a shield which has recently begun to crumble.

Subsection 11(c): Eliminating third-party recovery against the employer

Subsection 11(c) prevents (as the majority of states now do) a manufacturer from bringing third-party suits against the employer. Most states do not permit contribution or indemnity suits, under which manufacturers and product sellers may recover from a negligent employer all or part of a product liability judgment.

Generally, these jurisdictions have interpreted the "exclusive remedy" provision of the workers' compensation statutes to preclude such suits. However, several states have recently permitted product sellers to recoup product liability awards when the employer's negligence has caused or contributed to the employee's injury.¹⁸ Under this approach, the employer bears the cost of defending himself, while the product seller bears the litigation costs associated with bringing the claim.

These cases help our members and at one time, NMTBA supported this approach. However, we recognize that the goal of recouping our losses is achieved at the expense of an added lawsuit and higher transaction costs. We are also aware that unlimited contribution and indemnity suits are an indirect breach of the workers' compensation immunity. Professor Arthur Larson, the leading authority on the law of workers' compensation, has recently advocated that both subrogation and third-party recovery against the employer should be abolished—a solution which, he believes, "would achieve maximum simplicity without, perhaps, too shocking a departure from equity."¹⁹

For these reasons, we can support subsection 11(c), when taken together with subsections 11(a) and 11(b). These provisions will substantially reduce transaction costs, since the provisions effectively "cancel out" attempts by both employers and product sellers to recoup their respective losses by suing each other. Workers' compensation benefits which accrue to the employee would remain unchanged.

Subsection 11(d): Reinforcing the exclusivity shield

The workers' compensation system traditionally has required that the statutorily prescribed benefits which an employee receives comprise the exclusive remedy for work-related injury, the employee having forfeited any common law claim in tort against the employer. While the overwhelming majority of states has maintained this view, a very small minority of courts have recently veered from the exclusive remedy principle by permitting compensation-covered employees to bring suit directly against their employers. For example, several jurisdictions have imposed liability on employers who, in addition to their capacity as employers, also manufac-

¹⁸ See, generally, *Dole v. Dow Chemical Co.*, 130 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972); *Skinner v. Reed Prentice Division Package Machinery Co.*, 70 Ill.2d 1, 374 N.E.2d 436, cert. denied, 436 U.S. 946 (1978). (However, the effect of the *Skinner* decision appears to have been somewhat modified by the Illinois Legislature. See, ILL. REV. STAT. Ch. 70, Sec. 30-2 (1979).) West Virginia has recently permitted product sellers to recover from the employer when the employer's "intentional misconduct" results in employee injury or death. See, *Sydenstricker v. Unipunch Products, Inc.*, 288 S.E.2d 511 (W. Va. 1982). Minnesota and South Carolina have permitted product sellers to bring suit against the employer for amounts not exceeding the employer's workers' compensation liability. See, *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1979); *Burns v. Carolina Power and Light*, 88 F. Supp. 769, 774 (E.D.S.C. 1950). In California and North Carolina, when an employer's negligence contributed to a worker's injury, the employee's third-party recovery from the product seller is simply reduced by the amount the employee received in workers' compensation benefits. See, *Tate v. Superior Court of Los Angeles*, 213 Cal. App. 2d 238, 28 Cal. Rptr. 548 (1963); *Hunsucker v. High Point Bending And Chair Co.*, 236 N.C. 559, 75 S.E.2d 768 (1953).

¹⁹ Larson, "Third-Party Action Against Workers' Compensation Employer," Vol. 1982, Duke L.J. 483, 540 (1982). Professor Larson also recommends that the employee's recovery against the third party be reduced by the amount of compensation in all cases, not just in those involving employer negligence.

tured the product which was involved in the employee's injury. The employers' liability thus arises out of their "dual capacity" as both employer and product manufacturer. A few states have imposed liability on employers whose failure to comply with safety standards resulted in an employee's injury. These courts have broken with clear precedent by calling such negligent conduct an "intentional tort."²⁰

It is important to note that neither of these judicial theories of employer liability has worked very well, both having proved to be cumbersome and entirely unpragmatic. California, for example, recently rejected the dual capacity doctrine by statute²¹—a significant development since California courts were the first to adopt the dual capacity theory more than 30 years ago.²² West Virginia enacted legislation earlier this year which returns to a more traditional definition of "intentional tort" than the vague standard set forth by the West Virginia Supreme Court in 1978. Since the 1978 court decision, West Virginia employers have been besieged with at least 250 lawsuits (seeking more than \$5 billion in damages) filed by injured employees who receive workers' compensation benefits and then go after additional compensation through the courts. The legislation was based on the recommendations of a state commission, appointed by the Legislature last March to find a legislative remedy which would stem the tide of "frivolous" lawsuits filed by employees since the 1978 ruling.²³

Subsection 11(d), following the rule endorsed by the vast majority of states, prohibits injured employees entitled to workers' compensation benefits from bringing anything other than a workers' compensation claim against the employer, the employer's insurance carrier, or a co-employee. This provision thus overrules the tendency of some courts to abrogate employers' immunity in product-related cases. NMTBA supports this provision as a necessary reinforcement to the employer's traditional immunity from tort liability, and as an essential part of the overall compromise effected by section 11. By making clear that an employer's immunity will indeed remain intact, subsections 11(c) and 11(d) make up for the employer's "sur-render" of the subrogation lien required by subsection 11(b).

We view Section 11 as the product of consensus achieved over the past several years among workplace suppliers, employers, labor unions, and insurers. It fairly resolves an issue which has been vigorously argued in a variety of Congressional hearings²⁴ and widely discussed by legal commentators. It balances the need for equity (for all parties) and the desirability of reduced transaction costs. We commend Senator Kasten and the Committee staff for their tireless efforts to fairly address this complex and controversial issue.

COMPARATIVE RESPONSIBILITY

A. Section 9

Also relevant to the issue of workplace liability is the doctrine of comparative responsibility, based on a principle which distributes costs directly in proportion to fault. Section 9 of S. 44 adopts the theory of comparative fault, thus assuring that the responsibility of all persons allegedly involved in causing the claimant's harm—the product seller, third parties (including the claimant's employer), and the claim-

²⁰ See, generally, *Mandolidis v. Elkin Industries, Inc.*, 246 S.E.2d 907 (W. Va. 1978) (substantially overruled by statute); *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608 (1982). Both of these cases are based on the premise that an employer's failure to comply with safety standards constituted "reckless disregard" which resulted in employees being injured. The Supreme Courts of West Virginia and Ohio each determined that employer misconduct under these circumstances amounts to an "intentional tort" against an employee. The courts' analysis varies substantially from traditional tort law, which holds that merely knowing and appreciating a risk is not the same as having the intent to cause injury. Conduct undertaken with the knowledge that danger is likely to result therefrom may be "reckless" or "willful," but does not rise to the level of an "intentional tort."

²¹ Chapter 922, Sec. 6, 1982 Cal. Stat. 4944 (to be codified at Cal. Labor Code, Sec. 3602), passed September 13, 1982.

²² See, *Duprey v. Shane*, 241 P.2d 78 (Cal. App. 1952).

²³ See, Mohler, "In the Wake of Mandolidis: A Case Study of Recent Trials Brought Under the Mandolidis Theory—Courts Are Grappling With Procedural Uncertainties and Juries Are Awarding Exorbitant Damages for Plaintiffs," 84 W.V.L. Rev. 893 (1982).

²⁴ Most of what is included in section 11 of S. 44 has, in one form or another, been associated with previous legislative initiatives. See, for example, S. 2018, Workers' Compensation Act of 1975 (94th Cong., 2nd Sess.); S. 3060, National Workers' Compensation Standards Act of 1978 (95th Cong., 2nd Sess.); S. 420 National Workers' Compensation Standards Act of 1979 (96th Cong., 1st Sess.); plus, a variety of product liability bills which emerged in the 96th Congress, including H.R. 5626, H.R. 7000, and H.R. 7921.

ant himself—is to be assessed by the trier of fact in determining liability and damages.

This section codifies the "pure" form of comparative fault, which is vastly more favorable to claimants than the harsh "all or nothing" theory of contributory negligence, a rule of law still in effect in some states. In these jurisdictions, a claimant's recovery in a product liability tort claim may be completely barred if the claimant contributed (even slightly) to the injury²⁵—the fault of the claimant and the defendant are not compared.

A similar result may prevail in those jurisdictions which apply the "modified" form of comparative fault. In these states, the comparative fault of the claimant and the defendant(s) is assessed, but if the claimant's responsibility for the harm exceeds (or in some cases, equals) that of the defendant, the claimant may not recover. Approximately 25 state comparative negligence statutes adhere to this view.

By contrast, section 9 of S. 44 permits the claimant to recover regardless of his or her degree of fault, as long as the product seller is also at fault. In other words, the only situation in which a claimant would be totally barred from recovery under S. 44 is when the trier of fact has determined that the product seller was not responsible in any way for the cause of the harm. Thus, the provisions in section 9 help assure that claimants are reasonably compensated for all injuries caused by defective products. At the same time, product sellers are not required to absorb liability to an extent greater than their own share of responsibility.

With regard to this subject, we are, however, mindful that some have questioned the appropriateness of allowing the trier of fact to consider the role of non-parties (persons other than the claimant and defendants) when determining the apportionment of liability for injury. Critics of this provision [subsection 9(b)] object to the trial of the so-called "empty chair" as being unfair to both the non-party and the claimant. We remain unpersuaded by such arguments. Allowing the trier of fact to consider what, if any, role a non-party may have had in contributing to the injury seems to us a vital element in the ultimate determination of whether and to what degree a product manufacturer may be at fault.

This provision works to bring about equity in both the workplace and the non-workplace settings. For example, in the case of an injury resulting from the use of a consumer product in a non-workplace situation, it certainly seems unfair to exclude from consideration by the trier of fact evidence of the conduct of third parties (who for a variety of reasons may not be parties to the suit), when their conduct may well have been major contributing causes of the injury. Thus, it is entirely relevant that the toe guard of an injured consumer's lawnmower was removed by his neighbor prior to the consumer injuring his foot while using the product. It is only logical that knowledge of the neighbor's modification of the product would be important necessary information to be considered by the trier of fact in assessing how much responsibility and, therefore, liability, the product manufacturer should bear for the injury—whether or not the neighbor is a party to the legal action.

An equally strong argument can be made for such an approach in the workplace setting. Under the current formulation in subsections 9(b)(2) and 9(c), an employer who is found to have contributed to a product-related injury will not have any further liability to bear beyond what the claimant has already received in workers' compensation. Thus, his workers' compensation immunity shield remains intact, and the injured worker is assured of receiving workers' compensation benefits. He has given up his right to sue for employer fault as part of the workers' compensation "trade-off"—it is entirely unfair to arbitrarily place that "fault" on the shoulders of third-party manufacturers. The limitation of the product manufacturer's liability to the degree of his fault can, therefore, be made without risk of unfairness.

Thus, subsection 9(b), while unfair to neither the injured worker nor his employer, works as a mechanism to protect the product manufacturer from bearing more than his fair share of the injury-related expense. More importantly, it serves to place incentives for injury prevention where they will do the most good—usually with the claimant's employer.

Some have argued that the trier of fact should not be permitted to reduce a worker's award beyond the elimination of double recovery codified in subsection 11(a), even though failure to make this reduction would require product sellers to pay

²⁵ See, *Crane v. Neal*, 132 A.2d 675 (Pa. 1957). However, most jurisdictions which still employ contributory negligence principles maintain that recovery will be barred only if the claimant's negligence contributed substantially to the injury. See, *Bahm v. Pittsburgh & Lake Erie R.R. Co.*, 217 N.E.2d 217 (Ohio 1966). In any event, the Interagency Task Force study cited the "all or nothing" character of product liability litigation in some jurisdictions as contributing substantially to the escalating costs of product liability insurance premiums.

damages for which they bore no responsibility. Fairness would dictate otherwise. If, on the other hand, this Committee should decide to require product sellers to pay for more than their fair share of damages (as most states now require), it is imperative that the Committee also permit at least the introduction of evidence of employer fault, so that the trier of fact can accurately assess the *fault* (or lack thereof) of *all* the participants in the accident.

B. Section 10

By far, the most frequent causes of injuries involving machine tools are unsafe work practices and/or improper operating procedures and training. Therefore, we commend the provisions included in section 10 of S. 44.

The determination of the imprudent conduct of persons other than the product seller (whether or not parties to the action) is, in the vast majority of jurisdictions, the very essence of a product manufacturer's defense in many workplace claims. It is often necessary for the defendant to show that the conduct of other persons (often the claimant's employer) actually caused or substantially contributed to the cause of the claimant's harm.²⁶ Sections 9 and 10 of S. 44, taken together, preserve this equitable result.

On the other hand, failure by the trier of fact to consider and assess the imprudent conduct of non-parties would lead to very unfair results. S. 44 assesses and fairly allocates fault among *all* the relevant persons associated with an injury to whatever degree it may exist, and apportions liability on that basis to the degree it is consistent with already existing compensation mechanisms.

Section 10's treatment of the particularly troublesome issues of misuse and alteration of products is directly related to Section 9's allocation of responsibility among all persons—parties and non-parties. Subsection 10(a)(1) of the bill provides that if "a manufacturer or product seller proves by a preponderance of the evidence that misuse of a product by any person other than the defendant manufacturer or product seller and other than the claimant has caused the claimant's harm, the determination in subsection 9(b)(2) shall reflect the percentage of total responsibility for the claimant's harm allocable to misuse." A similar provision [subsection 10(b)(1)] applies to situations in which a product has been altered or modified [as defined in subsection 10(b)(2)] by someone other than the claimant or the defendant and such alteration or modification was the cause of the harm. In either case, the trier of fact may find that the misuse, modification or alteration was the sole intervening cause of the harm.

Subsection 10(c) provides that if the claimant misuses, alters, or modifies the product, or knowingly and voluntarily assumes the risk of harm of the product, a proportionate reduction in the judgment shall be made. This provision is particularly appropriate when viewed in the context of a recent opinion issued by an Illinois appellate court. The court observed:

"The liability issue in a product liability case cannot be tried in a vacuum in which the product is isolated. Rather, the jury should be fully informed as to how the incident occurred and how the plaintiff was using the product at the time of the occurrence."²⁷

We commend S. 44 for including as part of the definition of "misuse" [subsection 10(a)(2)] the failure of a product user to adequately train the claimant, or any other person, where this lack of training was a cause of the claimant's harm.

Recent machine tool industry statistics indicate that 65 percent of the product liability claims brought against machine tool builders were caused at least in part by the failure of employers to adequately train their employees. Fifty-eight percent of the claimants in these cases had been on the job for 6 months or less. These data make a compelling case that many workplace injuries involving machine tools could have been prevented had employers adequately trained their employees. The American Society of Safety Engineers has recognized that "injuries [in the industrial workplace] would be rare if equipment were kept in good condition and operated correctly."²⁸ (Emphasis added.)

NMTBA has consistently supported the view that a manufacturer of a defective product which causes injury because of that defect should bear the loss associated

²⁶ A number of jurisdictions currently permit juries to assess employer conduct for purposes of apportioning fault. See, *Billiar v. Minnesota Mining & Mfg. Co.*, 623 F.2d 240 (1980) (applying New York law); *Camburn v. Sioux Tools*, 323 N.W.2d 795 (Minn. 1982); *Forsythe v. Coats Co., Inc.*, 689 P.2d 43 (Kan. 1982); *Stevens v. Silver Mfg. Co.*, 374 N.E.2d 455 (Ill. 1977); *Connar v. West Shore Equipment*, 227 N.W.2d 660 (Wis. 1975).

²⁷ *Sanchez v. Black Bros. Co.*, 423 N.E. 2d 1309, 1311 (Ill. App. 1981).

²⁸ "The Refresher Guide for the Safety Professional," A.S.S.E., 1980, p. VI-57.

with that injury. However, it is unfair that a manufacturer should bear this expense to the degree it was caused by the product user's failure to adequately train or instruct its employee in the proper and safe use of the product. A number of recent cases support this position.²⁹

NMTBA endorses the comparative responsibility principles set forth in sections 9 and 10 as the most equitable methods of apportioning fault in a product liability lawsuit. Sections 9, 10 and 11, taken as a whole, go a long way toward restoring long-overdue balance to product-related claims which arise in the industrial workplace. These provisions ensure that the injured worker will be fairly compensated through both workers' compensation benefits and the tort litigation system—but that he will not receive "overpayment" in the form of a double recovery. The employer is assured that his liability will not extend beyond his obligations arising from the workers' compensation system. And, the product manufacturer or seller is assured that his liability will reflect only that portion of the claimant's harm for which he was responsible.

We urge this Committee, in its consideration of S. 44, to retain these sound and effective provisions.

TIME LIMITATION ON LIABILITY

From our industry's perspective, another major source of the imbalance which today characterizes most product liability litigation is that fact that machine tools enjoy such longevity of use in the industrial workplace. It is not unusual for a machine tool builder to be sued in connection with a machine produced more than one-half century ago—a machine which may have changed hands several times and which the manufacturer does not even know is still in existence.

My own company, for example, has recently defended product liability claims related to machinery we manufactured as long ago as 1926. Our defense of these claims—while successful—has resulted in substantial legal expenses, due largely to the fact that such claims are inordinately difficult to litigate because of the absence of records and other evidence necessary to establish liability, or the lack thereof.

In our view, it is unfair to continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age. Section 12 of S. 44 remedies this unfairness by establishing a 25-year time limitation on liability for harms caused by capital goods alleged to be unsafe in design or formulation, or harms caused by an alleged lack of adequate warnings or instructions. The time limitation begins to accrue from the date the product was delivered to its first purchaser or lessee who was not engaged in a business to sell or lease the product or to use the product as a component part. This provision is based on the rationale that "establishment of an outside time limit on liability recognizes that claims brought at an unreasonably late date after initial delivery place an unwarranted burden on trade, represent a wasteful use of judicial resources, and are unfair to manufacturers, product sellers and consumers alike."³⁰

Some have objected to this provision on the grounds that it unfairly and absolutely cuts off an injured person's right to pursue any product liability claim. This simply is not the case. First, the 25-year statute of repose established by Section 12 is a limited one, pertaining only to capital goods—that is, assets depreciable under ACRS (excluding motor vehicles) which are used in a trade or business, held for the production of income, or sold, leased, or donated for training or demonstration purposes. Further, the time limitation applies only to product liability claims which allege defective design or warnings. Therefore, if a person's injury resulted from a product which was mismanufactured (flawed according to the manufacturer's own standards), or a product which failed to perform according to a manufacturer's express warranty, the 25-year time limitation would not apply.

In addition, the statute of repose is subject to three very important exceptions. First, the provision does not apply if a substantial cause of the claimant's harm was

²⁹ See, generally, *Santiago v. Package Machinery Co.*, 260 N.E. 2d 89 (Ill. App. 1970); *Heldt v. Nicholson Mfg. Co.*, 240 N.W. 2d 154 (Wis. 1976); Wisconsin Supreme Court upheld dismissal of complaint following determination that claimant's negligence and that of his employer exceeded that of the defendant. The record was replete with evidence of employer's failure to properly instruct the plaintiff in proper safety procedures; *Levels v. Growers Ammonia Supply Co.*, 48 Cal. App. 443 (1975), appellate court upheld judgment that the employer was equally liable on the grounds that it was under nondelegable duty to provide employees with a safe workplace; *Sanchez v. Black Brothers Co.*, 423 N.E. 2d 1309 (Ill. App. 1981), appellate court upheld admissibility of evidence that sole proximate cause of plaintiff's injury was employer's failure to properly instruct in the correct procedure for cleaning machine.

³⁰ S. Rep. 97-670, *supra*, at 50.

the product seller's intentional misrepresentation of facts or the fraudulent withholding of information. Second, the provision does not apply if the harm resulted from the claimant's prolonged exposure to a product—asbestos, for example. Third, the provision does not apply if the product liability claim arises from a latent harm—that is, a harm caused within the 25-year period, but which was not discovered until after the period expired. This exception is specifically designed to include carcinogenic harms, which typically require a lengthy period of time before they become evident.

And, it is important to note that this provision does not establish a statute of limitation for product liability claims. Statutes of limitation, which run from the date of a claimant's injury, are left to existing state laws.

Also relevant to the criticism that this provision will "close the courthouse door" is the fact that very few valid claims will be eliminated, because the overwhelming majority of lawsuits involving older products are without merit. As a matter of common sense, if a piece of heavy machinery has operated without incident for over 25 years, how likely is it that the original builder is responsible for an accident involving that equipment? It is virtually certain that the accident is due to product misuse, alteration, or employee fault. What the statute of repose does, as a practical matter is to put an end to our legal costs incurred in battling over these issues concerning old and tired products.

Consider, for example, that of the 24 closed claims involving products more than 25 years old which my company has defended, none has resulted in judgments against us. However, those cases, along with the 21 claims involving overage products which are currently pending, have cost my company excessive and unnecessary legal fees. Thus, this provision will result not in the widespread reduction of valid claims, but in the reduction of the substantial transaction costs which are now being spent to defend frivolous lawsuits.³¹

In addition, the majority of injuries involving capital goods occur in the workplace. Because nearly 90 percent of the U.S. labor force is covered by a worker compensation statute, there is little likelihood that a person injured in the workplace will go entirely uncompensated, since those injured after the 25-year period would be eligible to receive workers' compensation benefits.

For these reasons, NMTBA strongly favors a statute of repose for capital goods. However, we believe that the 25-year time period proposed in section 12 is too long. This provision, as currently written, would permit product liability suits against our members for products they manufactured before the dawning of the Space Age.

Any period selected will necessarily be subjective. A period which is too short would be "unfair" to some claimants. By the same token, a period which is too long would be "unfair" to product sellers and would result in needless litigation and excessive transaction costs. In this regard, we would be happy to work with the Committee in devising an acceptable alternative.

CONCLUSION

Mr. Chairman, we commend you for recognizing the severity and extent of the product liability problem. Your bill, S. 44, restores stability and predictability to product liability law by providing clear and balanced guidelines that can be readily understood by all parties involved in the litigation process. Its adoption will ensure a fair and effective resolution to the product liability crisis.

In addition, S. 44 truly reflects the bipartisan and broad-based support of your colleagues. The current cosponsorship of this legislation (Senators Armstrong, Garn, Glenn, Goldwater, Gorton, Hatch, Helms, Huddleston, Lugar, Nickles, Percy, Pressler, Quayle, Stafford, Weicker and Wilson) represents a wide array of philosophical viewpoints—attesting to both the seriousness of the product liability problem and the merits of your solution.

Clearly, the case has been made—federal product liability legislation is needed now. We urge its early approval by this Committee and its early adoption by the Congress.

Thank you. We would be happy to respond to your questions.

[The following information was subsequently received for the record:]

³¹ Recent machine tool industry statistics indicate that approximately two claims in nine would be eliminated if the 25-year statute of repose for capital goods contained in S. 44 were adopted.

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. How would you characterize the relationship between product liability and workers' compensation?

Answer. The distinction between workers' compensation, a no-fault system, and product liability, a fault-based system, is blurring. I think S. 44 is a major step toward maintaining the distinctions. This is important because the interaction between the two systems has resulted in a situation characterized by imbalance, excessive transaction costs, and—most alarmingly—substantial disincentive for employers to provide and maintain safe working conditions. As an employer, I commend those portions of the bill which would preserve the fundamental concept of workers' compensation, such as employer immunity from tort liability. As a manufacturer involved in product liability actions, I support the standards of liability in S. 44 and the principle of pure comparative fault.

Question. S. 44 Would bar employers from bringing subrogation actions to recoup amounts paid in workers' compensation where the claimant-employee also recovers a product liability judgment. Do you support this portion of the bill?

Answer. Yes. It is another example of how the bill will clarify the relationship between workers' compensation and product liability. As an employer, I have made a commitment to paying workers' compensation and I am willing to forego the subrogation lien in return for immunity for further liability for an employee injury. As a manufacturer, I believe employers should not be able to pass off—onto me—the amounts they owe in workers' compensation. Employers, unlike manufacturers, are in a unique position to control the workplace environment. They—not the manufacturers—are responsible for seeing that equipment is properly maintained and safeguarded, and that employees are adequately trained in the safe use of industrial machinery. The subrogation lien clearly acts as a disincentive to workplace safety by shifting the focus away from accident prevention where it will do the most good—in the workplace.

Question. Your machines are used in the workplace. You have testified that employer fault is a factor in a number of product liability suits brought against you. How should employer fault be handled in product liability actions?

Answer. As a manufacturer, I believe I should pay only for the amount of harm which I am found responsible. Fairness dictates that I should not pay for harms caused by the plaintiff's own negligence, nor should I pay for harms caused by the negligence of any other person, including the employer. In order for the jury to reach an informed decision, it must be permitted to fully consider the circumstances which surrounded the injury, including the degree to which an employer's conduct was a cause of the claimant-employee's harm. This is entirely consistent with the idea of pure comparative responsibility in the bill.

Question. Under S. 44, employer fault may be a factor in reducing the judgment to be paid by the manufacturer. Is the result fair?

Answer. First, the result is fair to the manufacturer—he is required to pay only for the harm he caused. Second, the result is fair to the employer—the bill will insulate him from liability in tort, but will make him pay workers' compensation. Third, the bill is fair to claimant-employees—they will recover full workers' compensation from the employer, plus any damages for which the manufacturer is responsible. Further, the claimant will benefit because this approach creates an additional incentive for workplace safety.

Question. How does the pure comparative responsibility aspect of S. 44 create an incentive for employer safety?

Answer. An employer who must pay workers' compensation and cannot pass the obligation off through the subrogation lien, has every incentive to maintain a safe workplace and, thus, reduce his worker's compensation exposure. By contrast, where an employer knows that he can use the subrogation lien to recoup workers' compensation, he has nothing "at stake" and there is no reason to keep the workplace safe.

Senator KASTEN. Mr. Fark, we thank you very much and we appreciate your timing.

Professor, in your view is the treatment of employer negligence in product liability actions brought by an injured employee uniform under present law? Do you believe uniformity in this area is needed?

Mr. LARSON. No; it is anything but uniform. I indicated that the majority rule still is that the exclusiveness of remedy prevails in

the end, that the products liability manufacturer, as my colleague mentions here, generally winds up holding the bag.

But among the variants that have been attempted are a spectacular case in New York called *Dole v. Dow Chemical* in which the Court of Appeals bulldozed out of the way all the precedents on contributory negligence and contribution and all the other old doctrines of law and just came up with what they thought was a good idea of what to do about the situation, which was to have comparative negligence between the employer and the third party. They called it indemnity, implied indemnity.

Minnesota did somewhat the same thing but put a cap on it, so that the liability over could not be more than the amount of the workers compensation. Illinois did something like that, and then the legislature repealed the contribution part but left intact the indemnity part, for what that is worth.

California invented what seems like a very simple system in which in every case in which there is employer negligence, the amount of the employee's recovery against the third party is reduced by the amount of compensation. But that injects this whole idea of the employer's negligence into that particular lawsuit, and how do you determine that if the employer isn't even there, or maybe nobody feels like raising it? They have had dozens and dozens of cases in California struggling with every kind of variant on this problem.

So there is a tremendous lack of uniformity. One of the things that makes it even worse, Mr. Chairman, is not just what we have had in the past, but the fact that we are sitting on a kind of a time bomb here. Nobody knows what State court of last resort is next going to do what the New York Court of Appeals did.

There is a smoldering dissatisfaction with this situation from the point of view of the products manufacturer, and every now and then some State supreme court decides that it is time to change the whole rule.

And so the employers that are now in those majority States where they seem to have a secure wall of immunity and exclusiveness don't really know when they are going to wake up one morning and find that the wall of immunity has been shattered by something like *Dole v. Dow Chemical*.

Senator KASTEN. Mr. Mack, under S. 44 as it exists right now, employer fault may be a factor in reducing the judgment to be paid by the manufacturer. Is that result fair?

Mr. MACK. Clearly it is fair. It would not be fair to ask a manufacturer, one of our members, to pay for the cost of someone else's fault, and yet that is what happens under current law. It is fair, what the bill currently provides.

Some have argued that in applying that equitable apportionment solution beyond section 11, which I think everybody at this table agrees should remain in the bill, that you are depriving an injured person what they now can get under current law, and that is true.

If you wanted to adjust that equitable apportionment provision, remove that language from the bill, it seems to us that although we wouldn't consider it fair, that you are dealing here with a whole array of solutions to the problem that are going to be not very attractive to somebody, that if you are going to do that, that at the

very least, you ought to permit the trier of fact to have all of the facts and to look at the question of the conduct of all of the players and then make a determination of what happened.

What they might well do, as they do today, is to say well, the manufacturer just simply was not the person who caused this accident. There was some intervening cause here, which was the conduct of somebody else. As long as you permit that evidence to go in front of the trier of fact, reluctantly at least our association, who very strongly support what is in the bill now, would be prepared to defer to that compromise.

This whole effort, as Professor Larson has suggested, has been a very substantial compromise of all of the parties involved here.

Mr. LARSON. Mr. Chairman, I don't think you would have to knock out section 10 altogether. I think you would just have to take the employers out of section 10.

Mr. MACK. Right, there is language that you could use.

Mr. LARSON. That means you don't have to have that complicated first part of section 11 either. You can make that much more simple.

Senator KASTEN. Senator Gorton.

Senator GORTON. Mr. Chairman, thank you very much.

You know that although I am not a member of this subcommittee, I do have great interest in the bill. I am here too late really to question this panel or others. I wonder if, however, you would permit me to submit some written questions to the witnesses who have appeared before you today.

Senator KASTEN. We are anxious for you to submit those questions. We will submit your questions, along with questions from other members of the subcommittee who have been unable to be here today to the various witnesses, and hopefully they will get back to us in reasonable time.

Senator GORTON. Thank you.

Senator KASTEN. Gentlemen, thank you very much. On behalf of the subcommittee I would like to thank all of the panelists who have taken the time and effort to testify here today. We have heard some thoughtful comments from every interested group. The hearing is adjourned.

[Whereupon, at 11.30 a.m. the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF RALPH T. MILLET, CHAIRMAN, AUTOMOBILE IMPORTERS OF AMERICA, INC.

Mr. Chairman and members of the Subcommittee, I am Ralph T. Millet, Chairman of the Automobile Importers of America, Inc. (AIA), and a Director of Scania of America. AIA is the association of major automobile importers in the United States. A list of AIA members is attached.

I will limit my prepared remarks today to S. 44, the proposed "Product Liability Act" introduced on January 26, 1983, by Sen. Robert W. Kasten (R-Wisc.). S. 44 would establish preemptive federal product liability law. We commend the Subcommittee for its efforts with respect to S. 44 and its predecessor, S. 2631. We concur in the following introductory remarks of Sen. Kasten, wherein he explained the need for such legislation.

"Product liability became a serious problem in the mid-1970's and it continues today. The uncertainty and instability in product liability laws has become a major problem not only for manufacturers and product sellers, but also for consumers. Conflicting product liability rules have made it extraordinarily difficult for consumers to know their legal rights and for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers."

AIA generally supports S. 44—as it did S. 2631—insofar as it: (a) establishes preemptive federal legislation (section 3); (b) provides for the adjustment of damages on the basis of comparative responsibility (sections 9 and 10); and (c) preserves the incentive of product sellers to take subsequent remedial measures with respect to their products (section 14). AIA supports certain other aspects of S. 44. In other respects, we believe the bill should be changed. In particular, we believe that certain amendments to S. 2631 made in Committee markup and carried over to S. 44 will create significant problems for the automotive industry. These are specifically discussed in the following statement. I wish to make the following 11 points:

1. There is a need for federal product liability legislation.
2. Compliance with federal product standards and specifications should raise a presumption of reasonable product design, warnings and/or instructions.
3. Product liability legislation should include a reasonableness test for determining a manufacturer's or product seller's responsibility for alleged product harm.
4. Physical attachment of warnings or instructions to a product should not be required where impractical.
5. The obligations of product sellers to inspect products must be clearly defined.
6. Uncorroborated expert testimony should not be sufficient to establish a proposition of fact.
7. Product liability legislation should prevent the use of offensive collateral estoppel.
8. Claimants should not be exempted from the automatic requirement that product liability damages be reduced for product misuse, alteration or modification.
9. The determination of comparative responsibility should assume an affirmative obligation on product consumers to utilize product safety equipment.
10. Product liability legislation should establish a "reckless disregard" test for the award of punitive damages and provide for court determination of the amount of such damages.
11. The alternative time limitation on product liability should be reinstated.

1. There is a need for Federal product liability legislation

The rules determining the liability of product manufacturers and sellers for product-related injuries have been developed almost exclusively by judges on a case-by-case basis. These decisions have been based upon separate laws in each of the fifty states. The result has been not one but fifty separate laws relating to product liability each with its own theories of liability, defenses and procedural requirements. Thus, product liability law is a crazy quilt that is constantly changing, totally un-

predictable, and highly inconsistent. This has imposed a significant burden on manufacturers, distributors and sellers of products. This burden cannot be justified on the basis of consumer benefit, since the public is ill served by a complex of laws that is so complicated and inconsistent that the average citizen cannot determine his or her rights to redress for defective products. Consequently, there has been a rapid increase in the number of long and costly product liability lawsuits. This serves neither the manufacturer faced with the threat of highly excessive awards, nor the consumer who must frequently wait for years for the redress of legitimate claims. The groups primarily benefiting from the confused state of the law regarding product liability are attorneys who both prosecute and defend such claims in the courts.

For these reasons, AIA supports the efforts to enact a uniform law which would clarify the responsibilities of product providers and the rights of the consumers of products.

2. Compliance with Federal product standards and specifications should raise a presumption of reasonable product design, warnings and/or instructions

Staff Working Draft No. 1, released by your Subcommittee in late 1981, included a provision that compliance with federal and state product safety standards would be deemed to demonstrate reasonable product design, warnings and/or instructions, as appropriate, with respect to the compliant aspect of the product. Staff Working Draft No. 2, released by your Subcommittee in March 1982, included similar language related to federal standards and specifications. S. 2631 contained no such provision, nor does S. 44. In its December 1, 1982, report, the full Committee stated that "the Government standards issue merits further analysis."

AIA strongly urges that S. 44 be amended to include this concept on the same basis as Staff Working Draft No. 2. The provision should provide that compliance with federal product standards and specifications raises a presumption of reasonable design, warnings and/or instructions.

An increasing number of products are required to be designed and manufactured in conformance with government standards and specifications. Considerable technical expertise and expense are devoted to the development of these standards and specifications by government agencies, and to compliance with such standards by manufacturers. Their increasing application has been the result of the public's desire to insure standards of performance and safety with respect to certain products. While such matters may be a legitimate area of public concern and legislation, it is inequitable to require manufacturers to assume the time and expense of such compliance without protection from charges of product liability with respect to the compliant aspect of a product.

3. Product liability legislation should include a reasonableness test for determining a manufacturer's or product seller's responsibility for alleged product harm

Sections 5 and 6 of S. 44 provide for a "reasonably prudent manufacturer" test with respect to product design and construction, and product warnings or instructions. In addition, section 8 of S. 44 establishes a "reasonable care" standard with respect to product sellers.

AIA supports these provisions because it believes that manufacturers' and product sellers' responsibilities with respect to their decisions regarding design, construction, warnings, instructions and/or product handling should be based upon knowledge that they had or should have had at the time of production or product sale. Such provisions would be consistent with a "fault" concept of product liability. The tort system was initially developed to allocate liability on the basis of fault. However, in recent years some jurisdictions have moved away from the concept of fault and developed a compensation-oriented system that has eliminated fault as a consideration. This concept of strict liability without fault was originally intended to apply only to manufacturing defects in cases where it would be virtually impossible for a complainant to establish fault due to the nature of the manufacturing process. However, in most cases involving an alleged design defect, or alleged failure to provide adequate warnings, instructions or product servicing, complainants and complainants' experts have a full opportunity to review the product and its design and to present evidence regarding alleged fault on the part of the manufacturer or product seller. In design defect cases, it is therefore appropriate to firmly establish a "reasonable care" standard of responsibility.

4. Physical attachment of warnings or instructions to a product should not be required where impractical

Section 6(d)(1)(A) of S. 44 contains an exception—not contained in S. 2631 as introduced—to the rule related to manufacturer responsibility with respect to product warnings and instructions. It suggests that such warnings or instructions must be

attached to a product if this is "readily" possible. There is no definition of the meaning of this term in S. 44 and no discussion of the potential impracticality of such a requirement. Only in the Committee report is there language which addresses this issue. It states: "where a warning or instruction cannot as a practical matter be attached to the product or its packaging * * * this subsection will not apply."

Without a clearly defined test for practicality, automotive and other manufacturers will be subjected to the potentially enormous burden of attaching every product warning to a product. For many products, this requirement would be impractical and would run counter to long-standing industry practice and consumer expectations. With respect to automobiles, warnings or instructions typically are contained in the owner's manual. To require every warning and instruction to be physically attached to an automobile would impose a potentially enormous burden on manufacturers and would be likely to confuse consumers. The additional language in Section 6(d)(1)(A) pertaining to the attachment of warnings or instructions should be deleted.

5. The obligations of product sellers to inspect products must be clearly defined

Section 8(c)(2) of S. 2631 as introduced provided that a product seller is under no obligation to open and inspect a prepackaged product and is not liable for a failure to do so. In S. 44, this section has been replaced by section 8(d)(2) which states that a product seller is not liable "when there was no reasonable opportunity to inspect the product * * *." "Reasonable opportunity" is undefined. The vagueness of this language creates a potentially significant problem for automotive distributors since it suggests a requirement for product inspection without defining the scope of the required inspection. In short, while S. 2631 as introduced contained a limited and specific exemption from the requirement of product inspection related to prepackaged products, S. 44 suggests an open-ended inspection requirement with an unusable exception predicated on the undefined concept of "reasonable opportunity". We urge the Subcommittee to replace section 8(d)(2) with the language of S. 2631 as introduced.

6. Un corroborated expert testimony should not be sufficient to establish a proposition of fact

S. 2631 as introduced contained language in sections 4(b) and 8(c) which provided that expert opinion must be "supported or corroborated by sound objective evidence" to establish a proposition of fact. This language has been deleted from the counterpart provisions of S. 44, sections 4(b) and 8(b). We strongly urge the reinstatement of this requirement. Experts have assumed an increasingly important role in product liability legislation on behalf of both consumers and manufacturers. Because of the complexity of many product liability cases, jurors often are unable to evaluate fairly whether an expert's testimony has any basis in objective fact. The deleted language would provide courts with a tool to prevent abuse and to insure that an expert's opinion has some minimal basis in fact just as courts currently must insure that an expert's expertise has some basis in his educational background. Manufacturers, product sellers and consumers would all benefit from reinstatement of the deleted language.

7. Product liability legislation should prohibit the use of offensive collateral estoppel

Sections 4 and 8 of S. 44 provide, with certain exceptions, that neither complainants, manufacturers nor product sellers may establish a fact in a product liability action by showing that the identical issue of fact was decided in a prior action. Thus, such parties may not ordinarily establish facts by means of collateral estoppel.

AIA strongly supports the prohibition of "offensive" collateral estoppel by complainants in product liability cases since: (a) it is inequitable on its merits; and (b) manufacturers and product sellers have been prevented by the nature of the doctrine from using "defensive" collateral estoppel in such actions. Offensive collateral estoppel permits complainants to avoid relitigation of a fact or issue decided in a prior case involving different parties.

The concept of collateral estoppel, as it has been applied in recent years, is particularly inequitable in that only complainants are permitted to make use of the doctrine. As currently applied, complaints may use offensive collateral estoppel, but manufacturers and product sellers are unable to use defensive collateral estoppel, i.e., they may not defend a product claim based upon a prior defense finding with respect to a specific fact or issue.

A manufacturer or product seller should not be denied its day in court and its opportunity to contest a complainant's allegations. Conversely, it is certainly not an unfair burden to require each complainant to prove its case against the manufactur-

er. Moreover, two considerations should be the goals of any product liability legislation—(1) the reduction of transaction and litigation costs, and (2) the encouragement of the prompt filing of claims. These goals will be severely undercut if the use of offensive collateral estoppel continues. If complainants can use collateral estoppel to make their cases, they will be hesitant to consolidate or settle cases and will be encouraged to delay prosecution of claims until a favorable verdict in a similar case is rendered against the manufacturer in another jurisdiction. The only equitable method of handling the concept of offensive collateral estoppel is to prohibit its use in product liability actions.

Therefore, AIA supports S. 44's general prohibition of the use of collateral estoppel in product liability actions.

8. Claimants should not be exempted from the automatic requirement that product liability damages be reduced for product misuse, alteration or modification

Sections 10(a)(1) and 10(b)(1) of S. 2631 as introduced provided for the reduction or apportionment of claimant's damages for product misuse, alteration or modification by "any person". Claimants are exempted from these provisions in S. 44 and reduction of damages is now limited to a possible finding of comparative responsibility under section 9(b). We strongly urge the Subcommittee to delete the exemption for claimants. In effect, this provides special treatment for claimants, which is inconsistent with the concept of comparative responsibility as defined in section 9. There is no rational justification for this change. The exemption of the claimant should be eliminated to avoid inconsistent decisions as to claimant responsibility for product misuse, alteration or modification.

9. The determination of comparative responsibility should assume an affirmative obligation of product consumers to utilize product safety equipment

Section 9(e) of S. 2631 as introduced defined "comparative responsibility" to mean claimant conduct involving "negligence, contributory negligence or assumption of risk." This definition has been replaced in S. 44 by section 10(c), which limits the definition of comparative responsibility to three specific situations: (a) where a defective condition is apparent without inspection; (b) where the claimant knew of the defective condition and voluntarily used the product; and (c) where the claimant misused, altered or modified the product. By providing a specific definition of comparative responsibility, S. 44 effectively limits its application to these specific situations rather than requiring the judge to fully compare the claimant's conduct to the conduct of the manufacturer and product seller. This is particularly inequitable since the instances when a manufacturer could be held liable are not limited in this fashion. As an example of this inequity, none of the three subsections of section 10(c)(2) would clearly account for a claimant's failure to utilize safety equipment provided with the product—such as properly adjusted seat belts and head restraints. Since it would be impossible to legislate a comprehensive list of claimant responsibilities, we urge the Subcommittee to eliminate the limitations on the scope of comparative responsibility now contained in subsections (A), (B) and (C) of section 10(c)(2).

10. Product liability legislation should establish a "reckless disregard" test for the award of punitive damages and provide for court determination of the amount of such damages

Section 13 of S. 44 establishes a "reckless disregard" test for the award of punitive damages in product liability cases. It also provides that the determination of the amount of such damages should be made by the court and establishes criteria for that determination.

AIA strongly supports these provisions because they are likely to lead to more equitable and consistent decisions regarding punitive damages in product liability cases. The reservation of punitive damages to situations where a manufacturer shows "reckless disregard" for the safety of product users is the law in most jurisdictions. It would be consistent with a product liability system based on fault—rather than compensation—and a reasonableness standard for manufacturer responsibility. S. 44's provision that the amount of punitive damages should be determined by judges in accord with uniform criteria—rather than by juries—should lead to awards that are more closely in line with such a system; it would also be consistent with the penal nature of such awards.

At present, punitive damages are not permitted in some jurisdictions and types of cases. While manufacture exposure to punitive damages would therefore be increased by the enactment of S. 44, we believe that a preemptive federal standard is necessary in order to produce more equitable and predictable decisions regarding punitive damages.

11. The alternative time limitation on product liability should be reinstated

Section 12 of S. 2631 as introduced provided for a statute of repose on capital goods that specifically excluded motor vehicles. However, it also included an alternative, presumptive statute of repose of ten years. This alternative has been deleted from S. 44, with the result that S. 44 fails to establish a time limitation which could apply to product liability actions involving motor vehicles. Obviously, the effect of this is to leave the issue to state law. Since state law varies, neither consumers, manufacturers nor product sellers can be sure of their rights and obligations in this regard. Therefore, we urge the Subcommittee to reinstate the alternative provision.

CONCLUSION

Manufacturing and distribution of consumer products increasingly serves a nationwide market. Preemptive federal legislation to establish uniform national standards is clearly needed to restore order to product liability law. We commend the Subcommittee for its efforts and urge it to report legislation which reflects the concerns we have expressed in this statement. Thank you.

STATEMENT OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

The National Conference of State Legislatures appreciates the opportunity to submit a statement for the hearings on S. 44, the product Liability Act.

The National Conference of State Legislatures is the official representative of the nation's 7,500 state lawmakers and their staffs and is the only national state legislative organization that has the support of all 50 state legislatures. The National Conference of State Legislatures is opposed to this legislation. S. 44 would develop a national standard for product liability suits and invalidate any states' common or statutory law in the area. It represents one of the most blatant assaults on the federal system and the state jurisdiction within that system that has ever occurred. We are gravely concerned at the eagerness with which Congress attempts to sweep away years of state experience in the interest of almighty uniformity, even where uniformity would wreak unimaginable havoc on something as important and delicate as the federal system.

NCSL takes a very balanced approach on the issue of preemption. We approach preemption issues on a case-by-case basis because we recognize that there are certain instances where the federal interest may well outweigh the state interest in jurisdiction. We sincerely wish that the federal government would be as cognizant of the state interest; for there are indeed areas where federalism dictates the maintenance and the protection of state jurisdiction. Product liability is one such area.

In 1981, the National Conference of State Legislatures unanimously adopted the following policy on preemption:

"NCSL strongly opposes federal preemption of state and local government laws constitutional provisions and regulations without a clear and compelling case for such preemption having been made. We anticipate the situations justifying such preemption by the federal Executive Branch or Congress would be limited in number, in keeping with our federal system of government dividing powers between the several states and the national government, and that NCSL and other appropriate organizations would be afforded an opportunity for consultation or hearing before a final decision on preemption is made."

NCSL cannot support S. 44 because we were not consulted on the impact of preemption before the decision to preempt was made and because proponents have not made a clear and compelling case justifying this drastic remedy.

State legislatures should be among the first groups consulted when an attempt is made to preempt state legislation. In the product liability area, the combined experience of state common and statutory law represents over a century of experience. State courts, as well as state legislatures have grappled with and resolved the same issues the federal government would only begin to address in S. 44.

In preparation for this hearing, we informally surveyed the 11 states represented on the Senate Commerce Committee that have passed state legislation. Those states are: Alabama, Arizona, Kansas, Kentucky, Louisiana, Michigan, Nebraska, New Jersey, Oregon, South Dakota and Washington.

None of these states welcomed the prospect of federal preemption. The laws in most of these states were the result of coalition and hard-won compromise between lawyers, consumers and the business community. Members of the legislature, who cannot afford to represent only the trial lawyers, the consumers, or the business community faced the most difficult issues in the product liability area, and created order out of chaos. The resolution of issues in each state were different, but they

were based on circumstances that are unique to the states, circumstances that would be obliterated by an oppressive blanket of uniformity. I would like to highlight the more unique circumstances operative in some of the states mentioned.

The Arizona Constitution, Article 18, s. 6 prohibits any limit on tort liability. The clause states: "The right of action to recover damages for injuries shall never be abrogated and the amount recovered shall not be subject to any statutory limitation." In Arizona, it is imperative that the state legislature or judiciary define when a tort occurs, because once a tort is established, any amount can constitutionally be awarded in damages. S. 44 creates a more liberal cause of action than that contemplated by the Arizona legislature in light of their business markets and their constitutional provisions.

In Kansas, we found that a climate of panic had been created by the business and insurance community over product liability. There was also a lot of panic over rising insurance rates for medical malpractice cases. Thus, the legislature was under a tremendous amount of pressure to act in the product liability area. The Uniform Product Liability Act promoted by the Department of Commerce was considered by Kansas and did not pass because its provisions were considered too sweeping. What emerged as the Kansas product liability law was the result of a hard-fought compromise involving consumers, lawyers and business interests. Kansas also passed as statute requiring insurance companies to report the number of product liability suits and the damages awarded. There was a well-founded concern that the cost of premiums was not justified by the number of suits or the amount of damages awarded, especially since Domestic insurance companies admitted that product liability insurance rates were not actuarially determined. Since the enactment of this reporting requirement, insurance rates have stabilized and there have been no complaints from manufacturers, consumers or lawyers about the product liability law in Kansas.

In Michigan, the product liability legislation, again a result of compromise between opposing factions, was passed in conjunction with a reporting requirement for insurance companies similar to that passed in Kansas. Since the passage of both laws, insurance rates not only stabilized, they went down. That product liability law is also working well. Although people still get injured by products and companies still pay insurance premiums, there is no panic over product liability in Michigan.

Louisiana also presents a special situation. They are in the process of codifying their product liability law. In Louisiana, passage of S. 44 would create havoc. Louisiana's laws regarding sales are different than any other state's laws. They have not adopted the Uniform Commercial Code. Louisiana also considered the Uniform Product Liability Act, but rejected many of its provisions because they were irrelevant under their law of sales and warranties. As a result, a federal standard would not be welcome in Louisiana.

In South Dakota, the product liability statute complements the common law. The statute reflects the law as South Dakotans want it, based on a determination of the business and social climate that is best for South Dakota. The South Dakota product liability law has also operated quite well. There have been no amendments to the law since 1979 and there is no desire in South Dakota to eliminate a law that works for a federal standard that represents a untried formula.

The experiences of these states in the product liability area clearly indicates that a federal standard would create more problems that it solves. Every state has a different industrial and economic climate. Each state makes policy determinations, reflected in its common and statutory law, about the amount of business activity it wants to attract and the investment it wants to make in the public welfare of its citizens. These policy determinations require a delicate balancing process and an intimate knowledge of the market conditions that exist in the state. The nuances among industrial and business climates that exists in the states are myriad, but they are accounted for by the policy determination made by state legislatures. Consideration of these conditions is vital to the economic stability of states. The federal government could never develop the expertise to account for these nuances. The same level of business or industrial activity does not exist in all States. The same capacity to encourage or discourage product liability claims does not exist in every state, nor should it. There may be valid policy determinations why a state would encourage consumers to bring product liability suits, while another state may want to attract additional industry by not encouraging product liability suits against the industries that exist in the state. The fluid nature of the product liability tort dictates, at least, a state-by-state approach. It is distressing to us to note how little deference the architects of state legislation receive from their colleagues at the federal level, even though their statutes are the result of as much fact-finding and deliberation as federal statutes.

NCSL believes that preemption is an inappropriate remedy unless it addresses a national problem so critical and pervasive that the only way to solve the problem is through a national standard. Our experience with states cast severe doubt on the existence of a "product liability crisis." At the state level, manufacturers as well as trial lawyers are managing to live with state product liability laws. If, in fact, there is a product liability crisis, there should be a wealth of nationwide, or at least industry-wide statistics showing that a substantial number of businesses are losing money or going out of business as a direct result of product liability suits. Proponents should also produce statistics showing that a substantial number of manufacturers are not improving products or developing new product lines because of the variations in state laws. Upon a review of the hearing record for S. 2631, the predecessor of S. 44, we found very little in the way of nationwide statistics to support industry assertions. Instead, proponents recited anecdotal horror stories and the same old complaints about the inconvenience of complying with 50 state laws.

As far as NCSL is concerned, the least persuasive argument for the preemption of state laws is the inconvenience of complying with them. Every area under state jurisdiction has up to 50 standards of compliance. Difficulty with compliance and even the citation of some instances of inequitable result do not signify a national problem, especially since adoption of a federal standard does not per se guarantee equitable results. We urge the members of this subcommittee to conduct more analysis and consultation with state lawmakers on the magnitude of the product liability problem, if it indeed exists. Our survey of 11 states is not conclusive but it does point up the probability that business interests, consumers and lawyers are living with product liability, even if the associations representing those businesses would have Congress believe otherwise.

NCSL also believes that preemption is inappropriate as a remedy even if a nationwide problem exists, unless it is clear that preemption would solve the problems. It is not clear that preemption would solve the problem of certainty in product liability. In fact, we believe that creation of a federal standard would create more uncertainty for a number of years after enactment. Plaintiffs and defendants will have to determine what the federal standard means. This bill would change the whole notion of what a product liability suit is for many states and alters the rules of evidence that would apply. Thus, the number of lawsuits would probably increase after passage of S. 44. Ironically, while proponents of this legislation continually castigate state jurisdiction in the product liability area, they tolerate the maintenance of state judicial jurisdiction. Thus, while the proponents of S. 44 would argue that the common law that exists in 17 states, that was created by state courts, is unworkable, somehow, the courts that created those laws are competent enough to administer a federal standard. That notion is outrageous. It is incredible that Congress would consider sweeping away a century of valuable state experience in this area and at the same time require states to spend the money to enforce federal standards which proponents claim are so necessary to the well-being of everyone in this country. When people are injured by products today, they can seek redress at the state legislature and the state courts, those responsible for the creation of the product liability system. If this bill passes, people who are injured must still seek redress at the state level, although the federal government would have created the standard, and the problems resulting from it.

The certainty that proponents of S. 44 value so highly would be fleeting at best under S. 44. State courts would be the first, and, in a number of cases, the final arbiter of the federal standard. Every sentence of S. 44 is subject to 50 different interpretations by state courts. Certainty is, indeed, an elusive goal and an undesirable goal from the legislative standpoint. If S. 44 would create confusion by changing the standard of product liability and if that standard would be subject to different interpretations by state courts, then why not allow states to maintain complete jurisdiction in this area? Little would be gained by preempting state activity in this area.

NCSL strongly encourages proponents to consider the tremendous detrimental impact the creation of a federal standard would have a state legislature and common law initiatives. For example, states set up their own systems of workers compensation and industrial insurance. These would be impacted by a federal standard in the product liability area. Tort law has traditionally been a province of state common law jurisdiction. What is so sacred about the product liability tort that justifies a wholesale invalidation of state law? From a legal standpoint, there is nothing sacred about product liability. It reflects the same issues that other torts do. If those who would like the convenience of a federal standard are successful in this area, where does one draw the line? What is the value of state jurisdiction in any area if the mere inconvenience of complying with 50 state laws is persuasive enough to the federal government to eliminate state jurisdiction? Reliance on the state leg-

islative and judicial process provides a mechanism—a laboratory for testing whether new product liability standards and procedures are fair and workable. A uniform national standard precludes this healthy process of experimentation. States have a vital interest in protecting the health, welfare and safety of their citizens. The number and complexity of products in the stream of commerce demands that states become more vigilant, not less vigilant in protecting their citizens against unsafe products.

STATEMENT OF SYBIL SHAINWALD, NATIONAL WOMEN'S HEALTH NETWORK

The National Women's Health Network is the only public interest group devoted solely to women and health. It represents more than half a million women across the country in addition to having several state affiliates. On behalf of our individual members, affiliates and 300 organizational members, we wish to add our voice of protest to S. 44, a bill that will abolish the product liability law of all 50 states.

We believe that women injured by defective drugs and other hazardous products have a right to redress. The proper subject of tort law is the elimination of wrongs and the protection of victims. It is the branch of law that acts as a deterrent for the marketing of unsafe products and addresses the grievances of those that have been injured.

S. 44 will not only wipe out present rights but will also stagnate innovation and development in the field of product liability law. It is the state courts that have sought to accommodate social needs and to do justice in the face of an ever-increasing technological society. We note that the Conference of Chief Justices of these courts has registered its unanimous disapproval to the proposed legislation.

As women, we are deeply concerned that the rights gained in the states over the last 20 years should not be eliminated or restricted by the federal government. We are the ones who have taken DES; we are the ones who have used the Dalkon Shield; we are the victims of many other unsafe drugs and medical devices. It is only when legal cases were won that the Food and Drug Administration took action and banned them. We therefore oppose any attempt to impose further obligations on victims of hazardous products.

For example, a small percentage of DES daughters contract a rare form of vaginal cancer or suffer from other reproductive tract abnormalities. S. 44 would overrule *Sindell v. Abbott Laboratories*, in which the California Supreme Court held that the manufacturers of DES would be held liable on the basis of their share of the DES market if the plaintiff could not establish the identity of the manufacturer. NWHN believes it is not unfair to impose liability for a totally useless and untested product on the manufacturers who profited from its sale.

As the law now stands, manufacturers and sellers are liable only for injuries caused by the manufacture or sale of defective products. If there is no defect, there is no liability. S. 44 would ignore the common law's tradition of protecting the innocent. It would be a giant step toward the return to caveat emptor. It would uniformly reduce rights and severely penalize victims of faulty products by changing the substantive and procedural law of the states.

The law today examines the condition of the product and not the conduct of the manufacturer. A victim must prove that the product was defective but not that the manufacturer was negligent. S. 44 would eliminate this for drugs and medical devices among other products. Since women take more prescription drugs and women are responsible for contraception and the health care of their families, we must protest this major erosion of the substantive law. NWHN believes that the manufacturers who market defective products must bear the cost of injuries. We believe that victims have as many rights as manufacturers.

Further, no factual predicate has been shown for this restrictive and protective legislation by the bill's proponents. The so-called pressing national need for product liability reform has simply not been proven. An exhaustive report released in 1977 did not find the massive increase the insurance companies predicted with regard to claims filed, and even in high risk industries product liability insurance was shown to be less than one percent of sales in most of the industries studied.

The reasons identified for insurance premium increases which caused this so-called "crisis" are significant. Among them were subjective and irrational insurance rate-making practices, unsafe manufacturing practices, heightened consumer awareness and inflation. The government task force was unable to conclude that there was a crisis of the dimensions claimed or that changes in the law would produce a greater availability of or lower cost in insurance.

The proponents of "reform" have engineered the introduction of a bill which seeks to fix something that is not broken, and have failed to recognize that it is product liability law which eliminates wrongs and protects the innocent and the injured.

The National Women's Health Network believes that not only is there no proper purpose for federal product liability legislation but also that governmental interference will mean the reduction of rights for the women we represent.

We therefore join the Conference of Chief Justices, The National Conference of State Legislatures, the AFL-CIO, Congress Watch, DES-Action, The National Consumers League, The Consumer Federation of America and other consumer, legal and legislative groups in opposition to this retrogressive bill.

STATEMENT OF PROF. JAMES A. HENDERSON, JR.

At the request of the National Product Liability Council, for whom I am a consultant in the area of federal products liability reform, I attended the hearings on S. 44 held by the Consumer Subcommittee of the Senate Commerce Committee on April 6 and April 27, 1983. A variety of viewpoints were expressed, most of which were plausible even if some deserve, upon reflection, to be rejected. But three witnesses—Professor James Jeans and Messrs. Howard Specter and Karl Asch—gave testimony on April 27, 1983, which, in my opinion, call for rebuttal. I am responding to the Subcommittee's invitation to supplement the hearing record by submitting this statement in response to the testimony of these three witnesses.

First, I would comment on the general tone of the statements submitted by the two trial lawyer witnesses, Messrs. Specter and Asch who, together with the groups they represent, have a personal stake in whatever action may be taken by the Committee and the Congress. While these witnesses obviously have significant vested interests in the outcome of the debate, they make extravagant claims as guardians of the American way of life and of the "little people" in our society. Also the comparison of efforts through Congressional action to achieve increased uniformity and predictability in tort law with "East European code countries", which one of the trial lawyer witnesses made, seems highly inappropriate.

Turning to the specific content of the testimony, Professor Jeans begins with the general point that "tort law of necessity is painted in broad strokes" and cannot be codified. In contrast, areas such as contracts and trusts, which he labels "custodial laws", are compatible with codification. But tort law must, according to Professor Jeans, rely on concepts such as "reasonable person," "ordinary care" and "reasonable foreseeability."

I disagree with Professor Jeans' general proposition. First, he places far too much emphasis on it. Contract law, for example, relies heavily on concepts of "reasonableness," as does the law of trusts. And both bodies of doctrine were originated and developed by courts, rather than legislatures. The fact that portions of contract law were later codified by statute suggests that tort law could be dealt with in similar fashion. Moreover, tort law has traditionally had areas of fairly formal doctrine, in which lines are drawn rather specifically between worthy and unworthy claims. Thus, while it may be fair to characterize traditional negligence law as being marginally less formal than, say, contract law, I suggest that the difference is much less significant than Professor Jeans makes it out to be.

Also his general observation contains the implication that S. 44 is a rigid codification that would all but eliminate the flexible "reasonableness" concepts that have characterized traditional negligence law. This implication is, as I am certain the Subcommittee is well aware, quite unwarranted. In Section 4, for example, which sets forth the bases of responsibility for manufacturers, the reasonableness concept is invoked time and again, in one or another of its variations. And the bill repeatedly uses phrases such as "reasonable prudent person" (§ 12(12)); "unreasonably dangerous" (§ 4); "reasonable person" (§ 4); "reasonably prudent product user" (§ 6); "means . . . reasonably anticipated conduct" (§ 6); "reasonable practice" (§ 10). To be sure, the phrase "reasonably foreseeable" does not appear in the bill. But its omission reflects the draftsman's decision to avoid use of a confusing term that means a hundred different things to a hundred different people. Clearly the concept embodied in that traditional phrase is retained in S. 44. Thus, an unreasonably dangerous product must be the "proximate cause" of the plaintiff's injuries, and the conduct of the user must be "reasonably anticipated conduct."

It follows that Professor Jeans's general point about placing products liability law in a straightjacket of codification is not well taken. Traditional tort law was not markedly more flexible than the other areas that he concedes are compatible with

codification; and S. 44 would retain the flexibility of traditional tort law where such flexibility is justified.

The remainder of Professor Jeans's testimony is devoted to describing a number of places in S. 44 where, he maintains, the language would lead to unfortunate results. Even if he were correct with regard to some—or even most—of these places, the appropriate response would be to adjust the language of the bill rather than reject the idea of federal legislation. Thus, his analysis does not defeat the proposal. At most, it may serve to improve marginally what, in my opinion, is already a good bill.

His first point is illustrative. He alleges that the concept of unreasonably dangerous design in the bill may not include inadequate packaging and uses as an example of such an omission toxic lye being packed in a quart bottle with a screw-off cap, allowing an infant to ingest the lye. But packaging clearly comes within the definition of "product" in Section 2(10), and therefore there is no basis for his objection.

His second point relates to the appropriate time frame for determining hypothetically whether a reasonably prudent manufacturer would have used the design that injured the plaintiff. Professor Jeans urges a "time of sale" framework; S. 44 adopts the "time of manufacture or certification." He criticizes the bill because a manufacturer might, before sale, learn of a risk of which it neither knew or should have known at the time of manufacture, and should be liable for selling the product with such knowledge. Even if I agreed with his point in the abstract, the concrete example he uses is inapposite: an aircraft design that cannot withstand foreseeable wind shear forces may, and presumably would, be found unreasonably dangerous because the manufacturer should have known of the risks even if it did not actually know. Moreover, in the rare and unusual case where hitherto unknowable risks are discovered after manufacture but before sale, the manufacturer clearly owes post-manufacture duties to warn of such risks under Section 6(c), and would be liable under that section if it sold the product without adequate warnings.

What is the reason for handling Professor Jeans's unusual cases under Section 6 rather than Section 5? Once a manufacturer has manufactured a line of products, its production costs are irretrievably committed. If a hitherto unknown risk is thereafter discovered, prior to sale, the fair and efficient thing to do is to require the manufacturer to make full disclosure if it decides to go ahead and sell the products. If the risk renders the products useless, or self-defeating, there will be no market for them. But if a warning allows them to be used reasonably safely, that is clearly the better, far less wasteful solution. Professor Jeans would impose an approach based on hindsight in such cases that would automatically and wastefully condemn as unreasonably dangerous in design many products that could, with full and adequate warnings, be distributed and put to useful purposes.

Given the obvious constraints on space, I will not attempt to respond to all of the points raised by Professor Jeans. One more will suffice. On page 4 of his written statement, he offers a "poisoned cream puff" hypothetical case to try to demonstrate the need for retaining implied warranty of fitness in the bill. Without that basis, he suggests, consumers injured by poisoned puffs will be out of luck. I confess that although I have taught torts for almost 20 years, I cannot understand how he could reach such a conclusion. Clearly a cream puff that contains poison would be found to "deviate in a material way from the formula of the manufacturer (in this case, the bakery)," and thus to be "unreasonably dangerous" under Section 5(a) of the bill. Retaining "implied warranty of fitness" language would merely clutter it up with words that would add nothing whatsoever of substance.

Turning to the testimony of Mr. Howard Specter, his major concern is with what he calls "the dangers of federal codification of common law." He opposes codification, and he opposes the intrusion of the federal government into a regulatory arena traditionally reserved to the states. Regarding codification, he identifies five "dangers": (1) Congress may do a bad job; (2) products liability cases must be decided by courts, not the Congress; (3) mistakes in codification are difficult to correct; (4) a federal bill would reduce courts to automatons, applying the code's mechanical analysis; and (5) codification would change the common law.

Mr. Specter's first point, about how Congress may do a bad job, proves too much. Taken seriously, it would argue against Congress ever taking any action in response to any social problem, since there is always the risk that less than a good job will be done. The only sensible reaction to this point is to resolve to do a good job. Mr. Specter's second point—that courts must decide products liability cases—proves too little. Of course courts must decide these cases. S. 44 is designed to be applied by courts on a case-by-case basis and is designed to allow courts to base decisions on the facts peculiar to individual cases.

His third point regarding the difficulty of correcting legislative mistakes relates to his first point about the possibility of the Congress doing a bad job. If sufficient attention is given to the tasks of drafting and redrafting, major mistakes should not occur. As for minor mistakes in the nature of possible unintentional oversights, Mr. Specter clearly exaggerates the difficulties they present. Moreover, he fails to compare those potential difficulties with the difficulties associated with the alternative approach he prefers—leaving products liability law-making to the court systems of the 50 states. Even if one assumes that correcting legislative mistakes involves some difficulties, they pale in comparison with the difficulties—nay, the impossibility—of correcting via judicial lawmaking the mistakes that have been made and will continue to be made by courts attempting to develop a workable liability system on an ad hoc basis. Again, the personal interest of the trial lawyers colors their claim that the present system works even-handedly without need for Congressional action. There are many who believe that the uncertainty and confusion of the present system brings them significant financial gain.

Mr. Specter's fourth so-called "danger of codification" is that "it would reduce our adjudicating bodies (he means "courts") to automatons." A reading of the bill can lead only to the opposite conclusion. As I explained earlier in discussing Professor Jeans' testimony, the bill relies again and again, throughout its entire length, on principles of reasonableness. Far from becoming automatons, courts would be free to bring to bear the peculiar facts of individual cases to achieve just results. To be sure, courts would not be so free as they are under existing law to ignore traditional legal principles and reach inconsistent and socially harmful results. But eliminating that degree of judicial license is clearly an improvement.

Mr. Specter's fifth and final "danger of codification" is that a federal bill will "eschew the precedent of cases" (in plain English, he means "change existing law"). Mr. Specter exaggerates the extent to which the bill would change existing law. Manufacturers would continue to be strictly liable for manufacturing defects; they would be liable for bad design and failure to warn whenever they breached an express warranty or where shown to have been at fault. These are the most significant provisions in the bill, and in general they reflect existing law in many states.

If one were to take Mr. Specter's "five dangers of codification" and straighten them out, what would remain might come down to an unremarkable observation with which I would, in principle, agree: the Subcommittee must be careful to avoid making the bill to complex and comprehensive. As everyone who thinks we have a problem agrees, the heart of the problem lies with liability for bad design and failure to warn. If a federal bill focuses on design and warning and "eschews" sweeping reform, it will bring much-needed integrity to a liability system sorely in need of that quality. On the other hand, if it goes too far it will create, rather than solve, problems. To the extent that S. 44 strikes the proper balance, it deserves the Subcommittee's support.

The remainder of Mr. Specter's testimony is devoted to an argument that a federal bill would constitute an unwise and unjustified intrusion into states' rights. I am quite sure the Subcommittee has received much input regarding this issue, and hardly needs me to supply it with another long statement. Suffice it to say that the issue of states' rights, like so many other issues, calls for a balance to be struck between competing values. Only if Congress concludes that a serious problem exists affecting commerce among the states, and that Congressional action is needed to set things right, should a federal products liability bill be enacted. But if such findings are made, considerations of states' rights will have exhausted their proper role, and can offer no further impediment to responsible federal action.

Turning finally to the testimony of Mr. Karl Asch, it appears that his chief criticism of the bill is that it eliminates manufacturers' strict liability for defective products. In his words, the bill "dispatches strict liability by avoidance." Apparently, Mr. Asch has read through the bill and, failing to find the words "strict liability," concludes that the bill eliminates it altogether. And since, according to Mr. Asch, courts under existing law are imposing strict liability for manufacturing defects, unsafe designs, and failures to warn, the bill works a change in the law.

I believe Mr. Asch has misinterpreted both the provisions of the bill and existing products liability law. Regarding manufacturing defects, he is correct that courts are currently imposing strict liability, but he wrongly characterizes the bill as changing that reality. Section 5(a) clearly imposes strict liability on manufacturers for manufacturing defects. And while he correctly concludes that the bill avoids strict liability for designs and warnings, he is wrong in characterizing existing law as being different. A clear majority of courts impose liability on manufacturers for bad designs and failures to warn only on a showing of fault.

This second point, relating to design and warning, deserves further elaboration. Beginning with the promulgation of Section 402A of the Restatement of Torts, Second, in 1965, a number of courts and commentators have labored under the mistaken belief that it makes sense to speak of imposing "strict liability" on manufacturers for all defective products, whether the defects consist of manufacturing flaws or unsafe designs. In actuality, strict liability only makes sense in the former category involving manufacturing flaws. In those cases, the courts can determine whether a product is defective without engaging in the sort of cost/benefit analysis associated with the negligence standard. A product unit is defectively flawed if it deviates dangerously from the intended design.

In cases involving product designs, however, the courts must engage in a cost-benefit analysis in order to determine the adequacy of the design—there is no built-in standard, as there is in flaw cases, for determining the adequacy of manufacturers' design choices. Although some courts applying the cost-benefit analysis in design cases purport to apply "strict liability," in substance they are applying a negligence analysis. Thus, insofar as the bill requires a showing of fault on the part of the manufacturer in design cases, it conforms to, rather than departs from, existing law. As I have just explained, most courts apply a fault-based cost/benefit analysis in design cases, even while they purport to be imposing "strict liability." The bill eliminates this source of verbal confusion without changing the substance of existing law.

To these observations one further point must be added. A few courts in recent years have purported to hold manufacturers liable for distributing products containing unacceptably high levels of generic risk even when the manufacturer could not possibly have known of those risks when the products were manufactured and sold. To that limited extent, it must be conceded that those courts are holding manufacturers strictly liable for their product designs. And given the requirement in S. 44 that the plaintiff show the manufacturer to have been at fault, the bill would change the law in the few jurisdictions that have adopted the just-described, limited form of strict liability. But it must be borne in mind that this new form of strict liability for unknown and unknowable risks has proven to be very controversial, has been adopted by only a few courts, and has been rejected by a substantial majority of courts and commentators. Thus, even with respect to this limited form of "strict liability for design," the bill conforms to the majority position.

STATEMENT OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

NAII would support an effective federal liability act were it to bring uniformity and predictability to product liability law. It is our belief, however, that the Product Liability Act of 1983 (S. 44) would fail to achieve the desired uniformity and predictability. Therefore, NAII's position must be one of neither support nor opposition to the proposed bill as introduced.

NAII is a voluntary national trade association comprised of more than 500 member property and casualty insurers. Our organization represents a broad spectrum of the casualty and property insurance business in America. Our members range in size from the smallest one-state companies to the very largest national writers. They comprise both stock and non-stock corporations and reflect all forms of merchandising—independent agency, exclusive agency and direct writers. Our members include insurers serving a general market and those that specialize in serving particular groups of insureds.

Since its founding in 1945, NAII has been dedicated to fostering healthy competition in insurance rates and coverages under sound state regulation. The Association has played a leading role in broadening the channels of competition under the state casualty/property insurance regulatory laws in the post-McCarran Act period, and its member companies have provided a major share of the rate competition and product and marketing innovations under those laws.

NATURE OF THE PRODUCT LIABILITY PROGRAM

Unpredictability

Task forces that have studied the product liability program have concluded that uncertainty and inequity in the product liability tort-litigation system are causing serious problems in the product liability field. These problems include sharply rising costs in resolving product liability disputes, disincentives toward product innovation, and instability in the setting of insurance rates.

The uncertainty in the product liability tort-litigation system is caused in part by the divergent standards applied by state courts in product liability cases. Recent judicial interpretations in certain jurisdictions have applied hindsight perspective to the determination of whether or not a product is unsafe. These decisions have broadened the manufacturer's scope of liability and have left manufacturers with no assurance that a product considered safe and acceptable by today's standards will be considered safe and acceptable in the future. In addition, these decisions make it extremely difficult for counsel for manufacturers, sellers or insurers to keep abreast of the complex nuances in each state's laws.

It is not uncommon for a manufacturer domiciled in one state to manufacture a product in a second state, sell it in a third state, to a person domiciled in a fourth state, who is injured in a fifth state. The internal laws of each state could all offer different approaches to resolving liability issues. Complicating matters further, the tests as to which state's law would be applicable varies from state to state. Not surprisingly, anomalous results may, and often do, occur with this kind of uncertainty.

Some state legislatures have responded to judicial interpretations within their jurisdiction. Twenty-six states have enacted specific product liability legislation directed toward major concerns within those individual states. In addition, at least 12 other states during 1981 and 1982 considered product liability bills introduced in their legislatures. However, the majority of these 38 states have addressed only small portions of the law and not the key issues in this field. Furthermore, the legislatures of the states in which tort reform is most badly needed have not responded to the problem.

Inequity

The product liability laws of some states appear to be moving away from a fault-based system to a no-fault system with unlimited damages. Some appellate courts view product liability law as a compensation system rather than a means of apportioning fault. These courts seem to assume that the tort-litigation system should provide a recovery for any person, providing he or she was injured by a product, because the manufacturer or product seller is in a better position than the consumer to distribute or absorb the risk. The following decisions illustrate the increased exposure of product manufacturers and sellers.

Sindell v. Abbott Laboratories, 607 P. 2d 924, 163 Cal. Rptr. 132, 26 C. 3d 588 (1980), is illustrative of this inequity. This ruling permits a plaintiff to bring a cause of action against multiple defendants when the plaintiff is unable to identify which of the defendants manufactured the product causing the injury. Plaintiffs in such cases are permitted to receive substantial damages from multiple defendants without every proving that any defendant caused or was the probable cause of the plaintiff's injuries.

In *Beshada v. Johns-Manville Products Corporation*, 447 A. 2d 539, 90 NJ 191, the New Jersey Supreme Court decided that although traditional tort law does not hold manufacturers and distributors responsible for unknowable risks, the defendants would be responsible if their product was "defective", regardless of the fact that at the time of the manufacture or distribution the hazard was unknowable, and regardless of the fact that they were not negligent in failing to discover the hazard. This case came very close to enacting a "no-fault" system of compensation for product liability torts.

It is inequitable to require product manufacturers and sellers to participate in a compensation system that was not created by a legislature but was instead generated on a case-by-case basis by courts applying randomly defined standards of liability for product design or manufacture.

FEDERAL PREEMPTION—NAII POSITION

NAII has registered frequent opposition to legislative proposals advancing federal intrusion into the regulation of insurance. Our consideration of the Federal Product Liability Act (S. 44) calls for a re-examination of the basis for our long-held preference for state regulation over federal regulation even though it addresses tort law reform as opposed to specific insurance regulations.

In 1944, the Supreme Court in *United States v. Southeastern Underwriters Association*, 64 S.Ct. 1162, 322 U.S. 533, 88 L. Ed. 1440; reh. den. 65 S.Ct. 26, 323 U.S. 811, 89 L. Ed. 646 (1944), said insurance is commerce and, therefore, subject to federal antitrust laws. The Congress acted quickly by providing in the McCarran-Ferguson Act that the insurance industry is exempt from the antitrust laws to the extent it is regulated by the states.

In doing so, Congress gave recognition to certain unique characteristics of our business which called for a special form of regulation in lieu of a general antitrust approach, including:

(1) The crucial importance of solvency; (2) the need for continued close surveillance of insurers' reserves and financial affairs; and (3) the practical necessity for insurers to engage in certain forms of joint action in the pricing area.

Congress further recognized that the states are best able to provide the special form of regulation needed. Because they are closer to the situs of the insurance transactions, the states can best protect the multi-faceted interests of the consumer in the areas of solvency, price, product and availability.

As previously stated, NAI has consistently opposed federal intrusion into the regulation of our business. We fought for several years to defeat federal no-fault automobile insurance proposals. These bills would have granted the federal government power to determine how the legislation would be implemented. The ultimate effect of such legislation would have been federal control or preemption of automobile insurance rates, coverages and other vital areas of insurance operations now governed by the states.

In 1977 NAI registered opposition to the Brooke bill providing for federal chartering of insurance companies and establishment of a federal insurance guaranty fund system. This legislation would have repealed a substantial portion of the McCarran-Ferguson Act and would have created a costly, wasteful duplicative and inefficient branch of the government.

Presently we are opposing H.R. 100 and S. 372, proposals calling for federal intervention in the setting of insurance rates and specifically prohibiting the use of sex in insurance rating or benefit formulas.

The Federal Product Liability Act (S. 44) is distinguishable from these federal bills. In contrast, the Federal Product Liability Act (S. 44) does not create any new federal bureaucracy and leaves development and interpretation of the new law to the individual states.

We have opposed federal legislation that would intrude into the daily operations of insurance companies: their chartering, underwriting, setting of rates and offering of coverages. The Federal Product Liability Act (S. 44) has no such effect on the vital aspects of insurance industry function. Some would argue that the bill indirectly affects insurance as the product manufacturer or seller is often covered by liability insurance. However while there is an effect on the rating of product liability insurance and the resultant availability of such coverage, this cannot be considered regulation of the business of insurance.

NAI does not feel constrained in this instance by our long-held preference for state regulation of insurance. Given the severity of the product liability problem, the burden the problem places on interstate commerce, the inability of states to forge a solution and the tenuous connection between this legislation and the business of insurance, we would support legislation that would effectively solve the existing product liability problem.

ARGUMENTS FAVORING FEDERAL PREEMPTION OF PRODUCT LIABILITY

States unable to resolve problem

In the absence of a uniform federal product liability law, there is little that an individual state can do to remedy the product liability problem. If a state were to reform its product liability laws, the changes would affect primarily the citizens of that state and firms selling products to citizens of that state. Product sellers domiciled within the state sending their products through interstate commerce would be unaffected. As a result, even if the state reforms its laws, it is unable to protect product sellers located within its borders.

The inconsistency in state product liability laws results in residents of some states subsidizing the economic benefits which the courts and legislators of other states afford their constituents through greater legal protection of their economic interests. Many legislators are reluctant to let their own liability laws be any less favorable to consumers than the laws of another state. Therefore, not only are individual states unable to solve a national problem in product liability, but it may be against a state's economic self-interest to do so.

The difficulties of trying to enact a uniform product liability bill in 50 states are obvious. It is no longer realistic to expect states to respond in an adequate way to product liability problems that are essentially nationwide. A federal legislative solution would remove this problem from the state legislative arena.

Reduction of investigation and litigation costs

Proponents of the Federal Product Liability Act (S. 44) argue that the bill will provide a uniform law which can be applied by the courts in 50 states. Although a uniform federal product liability law would have little effect on the frequency with which product liability claims are brought or on the average award in such cases, it would result in a substantial reduction in the legal and investigative expenses associated with these claims. The application of a uniform federal product liability law would greatly reduce the amount of legal expense that manufacturers, sellers and insurers now spend to determine in each jurisdiction not only the current state of law as applied to a particular set of facts, but also the likelihood that past precedents will continue to be applied by the courts.

If there were a uniform and predictable body of federal product liability law applicable in every case, insurance companies would be able to evaluate litigation at a fraction of the present cost. In addition, a more predictable body of law would result in meritorious suits being settled more quickly and non-meritorious suits being resisted. Many millions of dollars could be saved in adjusting and defending claims by implementation of a uniform federal product liability law. The reduced cost of investigation and litigation would result in stabilized rates for purchasers of product liability insurance.

Reduction and stabilization of insurance rates

Product liability insurance is unique from other lines of insurance because products are generally manufactured in one state and then sold and used on a multi-state or nationwide basis. Because products are mobile and can give rise to liability in the states of manufacture, sale or use, product liability insurance rates must be set on a nationwide basis. The stability of product liability insurance rates is inextricably linked, therefore, to the stability and predictability of laws governing the area.

Insurance costs are a very visible, and yet unreliable, measure of a company's cost of conducting business. Companies which are unable to self-insure their product liability exposure view the annual insurance premium as their only readily quantifiable measure of product liability cost. However, because of the "long-tail" nature of product liability insurance and current competitive conditions in the insurance marketplace, the premium is a poor barometer of the true product liability cost.

Product liability insurance rates have been declining slightly since 1979. This has occurred despite indications that product liability claim frequency and severity are increasing sharply. From fiscal 1974 through fiscal 1981, product liability claims filed in federal courts alone increased by 47 percent. (Business Insurance, 1981, Product Liability Lawsuits Double Over Three Years.)

These increasing claim costs have yet to be reflected in the premiums that American business pays for product liability insurance. Product liability is a "long-tail" line of insurance in which the overwhelming majority of losses occurring in a policy period is paid in the years following the policy, rather than during the policy period itself. The effect of this "long-tail" phenomenon on product liability insurance rates is an inherent lag between rates based on past experience and current losses and expenses. Insurers consider a minimum of 5 years as statistically credible evidence for purposes of ratemaking. Therefore, even a sharp acceleration in losses and expenses during 1982 will be tempered substantially by the more favorable experience of the preceding four years in setting 1983 product liability rates.

Thus, as product liability losses which have not yet been reported or have not yet been settled are paid by insurance companies in the years following the policy period, insurance rates for such lines of insurance will again be subject to a tremendous upswing. NAI is concerned with the instability within the industry rating structure for product liability lines of insurance and the resultant effect it will have on future affordability of our product and solvency of our membership. A uniform and predictable body of federal product liability law could stabilize rates in this volatile area and increase overall financial stability within the entire business community.

ARGUMENTS AGAINST FEDERAL PREEMPTION

Uniformity will not result

The basic premise behind federal preemption of state product liability law is a desire to obtain uniformity of legal outcome amongst the various jurisdictions. Unfortunately, it is doubtful that the pre-emption of state statutes and case law will result in the desired uniformity.

A key element in the determination of liability relies on application of law to a particular set of facts. Section 4(c) of the Product Liability Act (S-44) dealing with liability of manufacturers, provides:

"(c) If the claimant has introduced sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make all the determinations specified in subsection (a) with the exception of the determination specified in subsection (a)(2), the product liability action nevertheless may be submitted to the trier of fact for a determination of the manufacturer's liability if the claimant proves by clear and convincing evidence and if the court finds that—

"(1) the claimant made every reasonable effort to establish the identity of the manufacturer of the product unit which allegedly caused the harm complained of;

"(2) the claimant has brought the product liability action against every manufacturer which could have produced, made, or constructed the product unit which allegedly caused the harm complained of; and

"(3) each of the manufacturers against whom the action is brought is in a better position because of superior knowledge or information than the claimant to establish which manufacturer actually produced, made, or constructed the product unit which allegedly caused the harm complained of."

This section of the law is intended to limit and clarify the effect of the *Sindell* decision previously discussed in Section IIB of this statement. However, in practical effect, a judge will be required in each case to determine whether or sufficient evidence was presented to warrant submission of the case to the trier of fact. Eventually some of these cases will be appealed and appellate courts will fashion tests for given circumstances to guide trial courts in determining how much evidence is sufficient.

It is doubtful that each jurisdiction considering these questions will arrive at exactly the same tests and guidelines. It is fairly well established that societal attitudes, and the judicial decisions influenced by these attitudes, differ from region to region (indeed they often differ significantly from rural to urban areas within a state). The practical result of the legislation's preemption of state law will not be a significant degree of uniformity. Rather, it can be expected that each state will again develop its own unique case law, but only after an interim period during which there will be significant confusion with a tremendous waste of court resources relitigating old issues.

NAII believes that having 50 state interpretations of one federal product liability standard, such as that proposed in S. 44, will produce as much uncertainty as it will eliminate. This will be compounded by the fact that there is no body of law, other than a state's own, to aid state courts in application of any federal standard to any given set of facts. Federal tort standards necessarily will contain provisions inconsistent with a state's own expressed policies. Inconsistencies from state to state in the application of one federal standard will inevitably lead to a great deal more litigation.

Professor Aaron D. Twerski of Hofstra University Law School, and Professor Alvin S. Weinstein of Carnegie-Mellon University, leading authorities on product liability, collaborated on a critique of the Model Uniform Product Liability Act (UPLA). This model act, completed in 1978, was a result of a federal investigation into the state product liability problem. The format of the UPLA model act is very similar to that of the federal product liability act presently under review. The authors of the article, "A Critique of the Uniform Product Liability Law—A Rush to Judgment", *Drake Law Review*, Vol. 28, Number 2, caution that:

"If it was thought that product liability law was difficult to predict and administer in its common law form, it is suggested that this statutory creature will complicate the task even further. For all its faults, the common law of products liability has a rational sense built on the foundation of centuries of tort law. What is presented to us in this proposed legislation is a set of rules and their exceptions, presumptions and evidentiary gambits that have no cohesive quality. Many of the ideas presented by the UPLA have enormous potential for inclusion into the common law development of products liability over the next decade, but they will require the careful hand of the courts to assure that such doctrines are developed through careful attention to the varying fact patterns which create the rich tapestry of products liability law."

We applaud the efforts of the drafters of S. 44 in attempting to develop a uniform and predictable body of product liability law. However, tort cases by their very nature present elements of uncertainty as each case presents facts peculiar unto itself. We believe that totally predictable results under any tort liability standard are an impossible goal in an adversary system of justice. NAII would support federal legislation in this particular instance were it to provide the desired predictability

and uniformity in this area of law. Unfortunately, we do not think that the Product Liability Act (S. 44) will have this desired effect.

Constitutionality

Finally, NAII is concerned with the constitutionality of the proposed Federal Product Liability Act (S. 44). The legislation, if enacted, would represent federal occupation of an area of law heretofore governed predominantly by state statutory and common law. The following questions have been raised:

(1) Does Congress have the power to preempt substantive tort law of the states with respect to product liability;

(2) If the Congress has such power, may it preempt only a portion of the tort law of each state;

(3) If the Congress has such power, would it offend the Tenth Amendment, which sets a limitation on the federal government's sphere of power by reserving to the states those "powers not delegated to the United States by the Constitution nor prohibited by it";

(4) May Congress deprive the federal district and circuit courts of jurisdiction over a product liability action that arises under a federal statute; and

(5) If it can, may Congress constitutionally enact what is basically a body of substantive tort law to govern product liability actions? Arthur W. Murphy, one of the authors of "The Law of Product Liability, Problems and Policies" a 174-page report published by the National Chamber Foundation in Washington, D.C., has similar concerns. He states that it is his belief that a law which establishes a federal cause of action but does not confer jurisdiction on the federal courts may violate the Constitution. He notes, however, that the alternative of expanding the jurisdiction of the federal courts by a national product liability statute would meet with strong opposition from Supreme Court Justice Warren Burger. (Regulatory and Legal Developments, Bureau of National Affairs, 1-27-83.)

CONCLUSION

The NAII has just re-evaluated our position on the Federal Product Liability Act of 1983 (S. 44). We continue to be concerned with the ongoing problem in product liability and would support a bill that would effectively solve this situation. However, we do not believe that S. 44 will provide the desired uniformity and predictability. In addition, we have serious doubts about the bill's constitutionality. For these reasons we are unable to support S. 44.

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA—NEW JERSEY

The New Jersey Affiliate of The Association of Trial Lawyers of America is composed of approximately twelve hundred New Jersey lawyers who primarily practice representing injured members of the public in personal-injury litigation. It is on behalf of that constituency, our clients—the public—that we gratefully acknowledge this opportunity to present to you our collective views on pending Federal pre-emptive product liability legislation.

FEDERAL INTRUSION IN AN AREA TRADITIONALLY RESERVED TO THE STATES

The proposed Federal product liability bill would represent a departure from the recent trend away from the collectivization of power in the central government. We are in an era of less Federal involvement, not more. The New Jersey experience in product liability is an outstanding example of why the Federal government should not intervene in this area. New Jersey is a senior northeastern state, highly congested, highly industrialized, and with an aging industrial plant structure. Workplace machine injuries and toxic exposure injuries are commonplace, everyday events. It is on this base, and to meet the needs of its citizens, that the judiciary in New Jersey has formulated the most extensive remedies in this area among all of the states. Legal investigators can be certain that when advanced concepts of remedies in product liability doctrine are announced, New Jersey judges will be among the earliest decision makers, along with those in such states as California and Michigan.

Such leadership is in response to the needs of the citizenry and the public good, and does not develop arbitrarily from private social philosophy, dilettantism or esoteric radical thinking. Other sections of the country, the great agricultural states, the sparsely populated wilderness states, are not faced with the same frequency of injury and concentration of damage that is prevalent in New Jersey.

Legislators in the far west and northwest would not freely offer advice to New Jerseyans on how to cope with urban decay, or industrial pollution; as it would be presumptuous for New Jerseyans to offer legislation addressed to the water, river and irrigation problems of the southwest.

The great social evil of accidental personal injury from defective products is best left to adjudication on the state level, rather than imposition of central control from Washington, which is less schooled in the dynamics of the local problems faced by each of the states.

SHIFTING OF THE BURDEN OF THE LOSS TO THE VICTIM IS ECONOMICALLY UNSOUND

The opposition to broadening remedies in product liability law originated first with insurance companies, and then the business community. The insurance companies indulged in panic pricing and panic propaganda on the great "cost" of product liability insurance. The insurers alleged they could not afford to sell product liability insurance; but when the business community rebelled against the high premium cost and sought risk-retention legislation to obtain tax relief to permit self-insurance for product liability, the insurance community quickly terminated the so-called "product-liability crisis" in the face of precipitous loss of markets to self-insurance.

But the economic arguments against restrictive product liability legislation go deeper than the mere exposing of the venality of certain elements of the insurance and business communities.

Two factors must be addressed: First, tort remedies contain an element of deterrence. Manufacturers and suppliers will be more careful of their operations and their products, knowing it will cost them money if someone is hurt as a result of some product deficiency. The economy and society suffer a loss whenever someone is hurt by a defective product, regardless of whether the victim or a sector of the economy ultimately bears the brunt of the loss. The less defective products, the less injuries, the less losses, the more efficient economic system.

We don't presume to ignore the humane factors involved, as we must be compassionate to those fellow humans who undergo pain, suffering and mutilation by reason of defective products. But it is plain old dollars and cents business logic that the better product business makes, the more money business will make. Products liability helps to make for better products. Consumerism and its emphasis on product safety can trace its roots back to product liability litigation over the ill-fated Corvair of the early sixties.

The second economic factor to be considered has to do with shifting of the burden away from business and back to the victim. The theory is that business will prosper without the burden of its victims' losses. We submit the losses will not be restricted to the victim, but present a potential government welfare increment. Simply stated, a maimed worker no longer able to work, and without the prospect of financial redress, becomes a potential applicant for permanent government assistance. Products liability as presently constituted provides a private remedy, and the cost is contained wholly within the private sector. The same businessman who rails against the high cost of product liability insurance, will be equally vociferous if taxes are increased to meet the public need. Business can't expect to "have it both ways".

THE JUSTICE OF SPREADING OF THE RISK

The Supreme Court of New Jersey has expounded the concept of spreading of the risk as the underlying economic assumption in the doctrine of product liability. The makers and producers are in the best position to assess the potential costs of all risks in a business venture, and insure against any losses, including product liability claims. The costs are then computed into the price and all share; the businessman whose profit margin is affected by the higher cost; and the user, who is required to pay a higher cost. Both the producer and the buyer benefit from the product, so it is only fair that they collectively share the negative risk factors as well as the benefits that flow from the product and its use. Better this than imposing the often times devastating cost of severe injury upon a victim of a defective product.

* * * * *

We trial lawyers make our living representing the injured, and obtaining redress for those damaged by others. Our clients do not make money on their "cases". They would be much better off without the injuries, and without the money awards. It is on their behalf that we present these views. We see their misery, we see their needs first-hand. It is incumbent upon us all that we do not allow their rights to be taken from them.

STATEMENT OF ROBERT TAFT, JR., ON BEHALF OF SPECIAL COMMITTEE FOR WORKPLACE
PRODUCT LIABILITY REFORM

I am Robert Taft, Jr., General Counsel for the Special Committee for Workplace Product Liability Reform. This is a nonprofit corporation organized by a group of 14 trade associations and other concerned parties for the purpose of seeking a remedy to the product liability crisis in the workplace. Those represented by SCWPLR include a wide spectrum of capital equipment machinery manufacturers, distributors, and marketers including approximately 7,000 companies with a total annual sales volume in excess of 30 billion dollars, employing approximately 2 million employees, and operating in all 50 states. We offer our support of S. 44, "The product Liability Act."

We believe that the facts which have been developed by the Interagency Task Force on Product Liability, the Congressional hearings on product liability, and the studies and surveys conducted by other organizations (including our own members) clearly establish that the product liability problem in the workplace has reached proportions threatening to the industries of America. We agree with Senator Kasten's statement that "product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce."

We commend the Committee members and your staff for preparing a comprehensive and precise product liability law. We believe that S. 44 will simplify, clarify, and bring uniformity to the present tort law of product liability. It should also help to overcome some of the injustices and inequities which have resulted from the extreme positions taken by the courts of some states. By specifying criteria for determining responsibility and limitations on responsibility, S. 44 should reduce uncertainty and ambiguity in the product liability field.

Our organizations' concern focuses particularly on the unique product liability problem of the workplace. We believe that the product liability problem as it relates to workplace injuries is interwoven tightly with the inequities and injustices inherent in our current system for compensating victims of workplace injuries. Under present law, almost all state workers' compensation statutes (and/or their court interpretation bar recovery of indemnification from the employer by a workplace product manufacturer, no matter how negligent the employer may have been in failing properly to guard and maintain that product or in failing to instruct and monitor his employees on how to use it. This inequity is further compounded by the fact that, in many jurisdictions, the employer and/or his workers' compensation insurance carrier obtains a subrogation lien from third party recoveries even though the employer may have caused or contributed to the cause of the employee's injury. The Insurance Services Office (I.S.O.) study reveals that about 58 percent of workplace product liability bodily injury payments involve cases where the employer may have been negligent. Thus, manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while employer-users of the products are completely relieved of financial responsibility despite the fact that they may have been in a better position (or in the only position) to prevent the accident from occurring. For example, it is the employer who has control over the equipment, its maintenance, and its use, and it is the employer who makes decisions determining whether potential injuries outweigh the cost of preventive measures. Insulating employers and employees from the effects of their own negligence results in a disincentive for work place safety. The present system is extremely unfair and wasteful, and the wrong party is paying the bill for this wasteful system.

In a 1976 survey of the National Machine Tool Builders Association, it was found that in only 13 percent of the workplace product related accidents could a case be made that the accident resulted from some sort of mechanical failure of the machine itself. Many of the machines have been modified one or more times by the employer and/or the person or persons from whom he bought the machine. The study shows that 18 percent of these machines were poorly maintained by the employer. Sixty-three percent of the time the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred because he failed to make sure that his employees used the appropriate safety device. Sixty-five percent of the injured employees did not receive appropriate training from their employers on how properly and safely to operate the machine. The survey also showed that 56 percent of the injured employees had been on the job for less than six months prior to the accident. These statistics reveal the variety of causes of workplace injuries, which are beyond the product manufacturer's control and yet, because of the failure to integrate the legal principles and social basis of strict liability and workers' compensation, the manufacturers of workplace products

are paying for these injuries while the employee and employer are relieved of any responsibility. The House Subcommittee on Capital, Investment, and Business Opportunities concluded that: "It is inequitable for manufacturers to shoulder the entire burden for workplace injuries when the employer's negligence contributed to the same." H.R. Rep. No. 997, 95th Cong., 2d Sess. 74 (1978).

The impact of this burden on insurance premiums, rightly or wrongly, has been overwhelming. The Insurance Services Office Closed Claim Survey of 1977 found that, although only 11 percent of the claims of workers injured on the job are product related, these claims result in 42 percent of the total amount of payments made on all product liability claims (including both workplace and nonworkplace). In an analysis conducted by the American Mutual Insurance Alliance of 79 large-loss claims, it was found that nearly three-fourths of the awards (70 percent) involved industrial products, and 60 percent of the 104 injured persons sustained bodily injuries while at work. The Industry Study conducted for the Interagency Task Force on Product Liability points out that "firms of small and medium size are more likely to have claims experience if they are engaged in manufacturing workplace machinery or equipment rather than consumer goods or 'anonymous' products." Product liability insurance premiums have undergone dramatic increases over past years and may be expected to rise again in the future. Those companies who have deductibles have been required to retain an ever increasing portion of their liability. This situation had resulted in enormous increases in insurance premiums for manufacturers of workplace products.

The high costs involved in having key personnel assist in the defense of a case must also be considered. We cannot understate the cost to industry of executive and engineering time spent in responding to voluminous discovery requests and in defending product liability suits.

The cost of resolving product liability disputes cannot be overlooked. These high transaction costs are caused largely by the lengthy litigation involving applicable rules of liability, rules that are subject to a great deal of uncertainty. The American Insurance Association data reveals that for every 66 cents an injured claimant receives, 77 cents is spent in legal costs. The quantity of product liability lawsuits has led many product liability insurers in the late 1970's to either leave the field or to charge high premiums unrelated to the insured's individual claims experience. These high transaction costs cannot be justified as part of any meaningful compensation system.

Unfortunately, in dealing with this crisis, the manufacturers may not in fact even have the option of selling out and ceasing to operate in the field rather than risking bankruptcy, since unfunded contingent liability on claims not yet filed makes it difficult if not impossible to sell small companies in the machinery manufacturing and distribution field, even through a sale of assets. In *James Allen Trimper v. Bruno-Sherman Corp.*, 437 F. Supp. 349 (E.D. Mich. 1977), for example, the court found that liability can attach to a successor to certain assets of the original third party manufacturer of a machine which was involved in an injury, even though there had been two intervening sales of assets of the original company. Fear of being "infected" with potential future claims through any interrelationship, no matter how attenuated, leaves the manufacturer who cannot afford insurance unable even to sell his company or its assets.

The harmful effect of these economic realities upon the capital equipment industry in the United States is hard to estimate exactly; but it clearly has had a major impact on increased prices with an attendant ripple effect on sales, inflation, and ability to compete with foreign sources. The costs are ultimately passed on to U.S. consumers in the form of higher prices for products. Some companies discontinue manufacturing those items that account for most product liability suits and thereby remove highly vulnerable, but possibly vital, industrial products. The Interagency Task Force on Product Liability in its 1978 study also found that some firms are already reluctant to develop and introduce new products because of product liability risk. This trend could exacerbate the already serious problem of the United States losing its competitive edge in technology.

Product sellers, insurers, and risk retention groups need a uniform, unambiguous, and fair product liability law so that they will have a firm basis upon which to project their responsibility and liability exposure. Currently, the "rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome." 44 Fed. Reg. 62716 (1979). The proposed "Product Liability Act of 1982" addresses this problem where it must be dealt with: at the Federal level. At the same time, however, it calls for no expenditures of Federal revenues, no new Federal bureaucracy, and no expansion of the Federal courts.

There is no single system or common body of laws which exists in the United States concerning product liability. Each state has its own common law on product liability. In recent years this common law has been subject to frequent and substantial revision. Because of the rapid change in product liability law in each state, and because the common law rules on product liability vary from state to state, it is virtually impossible for a manufacturer of products sold throughout this country to determine the current status of "the law" when it is attempting to determine its legal duties. Insurance companies claim that they cannot predict their exposure and that, to avoid disaster, they are forced to assume the worst and charge accordingly. Manufacturers are outraged at increases in deductibles and high premiums which do not reflect actual product risks or liability losses.

There are those who say that current efforts to achieve product liability reform at the state level will resolve this problem. However, that solution ignores the fact that product liability insurance rates are not set on a state-by-state basis, but rather are established on the basis of a nationwide experience. Since the sale of products is not limited to the state in which they are manufactured, and tort law varies from state to state, it is not surprising that the insurance companies set their rates on their nationwide loss projections. Furthermore, there is no indication that tort reform laws that are passed on a state-by-state basis will be sufficiently similar ever to form the basis for the predictability and certainty which are a prerequisite to lowering of insurance rates.

We also recognize that the thousands of small businesses represented by our organization cannot afford the legal and engineering time and cost which would be necessary to analyze the responsibility of a manufacturer under the product liability laws of all 50 states. This has had a chilling effect on product development and innovation. Furthermore, the uncertainty in the law requires extensive and costly litigation in the pursuit of further definition and determination of what legal principles are applicable in a given case. A court must not only decide which state's law will govern the case but it must also then delve into the morass of conflicting decisions concerning the subject. Of course, this is exacerbated by the increasing volume of product liability litigation. Indeed, the number of product liability cases filed in Federal courts around the country has "more than doubled in the last three years." *Business Insurance*, October 12, 1981.

It is important to note that the tort reform laws which have been passed at the state level are not consistent but different in substantial degree. In fact, recently enacted state product liability laws have created new variances in our nation's tort laws, resulting in more confusion and uncertainty. Over thirty states have enacted some form of product liability statute in the past six years. Of the states which have passed such legislation, some have passed a statute of repose, cutting off liability on products after a given life span, and others have not. Some of these provide for an absolute cutoff of liability after a number of years (varying from 6 to 12), and others provide for a presumption of no responsibility after a given number of years or something less. While some provide that modification or misuse of a product is a defense, others do not. Some of these statutes are very limited in scope; others are more comprehensive. The language used for similar provisions differs, thereby opening the door for varying judicial interpretation. While we applaud the efforts to achieve tort reform at the state level, we have no confidence that the same bill will be passed in each state with the same provisions or the same language. The current experience with state tort legislation suggests variations will occur even in passage of a model product liability act, followed by further variation in judicial interpretation. Finally, we believe the inequity and imbalance in the current product liability system must be corrected with a minimum of delay. The adverse impact on medium and small business and ultimately upon consumers and the economy in general cannot be allowed to continue much longer. It took 15 years to pass the Uniform Commercial Code at the state level, and it still has variations from state to state. The nation cannot afford to wait 15 years for widespread passage of a model product liability act.

It is argued that we should not have tort reform at the Federal level because tort law has historically been the province of the states. We believe recent legislative history indicates that this is not true. There are a number of Federal statutes which were enacted to provide benefits or settle claims where state law was deemed inadequate to compensate for workplace injuries. Perhaps the first Federal legislative effort in this area was the "Federal Employees' Liability Act" which was passed in 1908 in order to apply a Federal tort law to determine the damages incurred by any railroad employee injured or killed in the course of employment. This was followed in 1927 by passage of the "Longshoremen's and Harbor Workers' Compensation Act" which provided workers' compensation as well as a Federal tort law to deal

with claims against ship owners. More recently, laws have been enacted which, for example, provide compensation benefits for non-Federal law enforcement officers (5 U.S.C. §§ 8191-8193) and compensation for black lung victims (30 U.S.C. §§ 901-936). Importantly, the tort law called for here, unlike the Longshore and Black Lung schemes, requires no Federal bureaucracy and no expenditure of Federal monies.

Since the late 1960's, there has been an increasing involvement of the Federal government in tort law related issues: "The Crime Control and Safe Streets Act" 18 U.S.C. § 2520 (1968) (civil action against any person who intercepts a telephone conversation); "Consumer Product Safety Act" 15 U.S.C. § 2072 (1972) (Federal tort remedy for persons who are injured as a result of a knowing violation of a safety standard or rule of the CPSC); "Price-Anderson Act" 42 U.S.C. § 2012 (1975) (no-fault compensation system for catastrophic accidents at nuclear power plants); "National Swine Flu Immunization Program" 42 U.S.C. § 247(b) (1977) (Federal responsibility for strict liability tort claims that arose out of that program). In addition, Federal regulation of airline transportation has changed the law of trespass and nuisance as it regards aircraft. Moreover, the comprehensive "Environmental Response, Compensation and Liability Act of 1980," which deals with the damages that arise from hazardous substances, impacts on traditional state tort law by establishing Federal strict standards of liability, joint and several liability, as well as apportionment of damages. Clearly, there is ample precedent for Federal legislative activity in tort law. The tradition of state control over tort law has long given way where there is a need for national solutions to national problems. The proposed legislation addresses what is certainly one of the most appropriate and sorely needed areas of Federal attention.

Because of the severely detrimental impact on interstate commerce of the current chaos among states regarding product liability, we believe that product liability reform should be enacted at the Federal level and not on a state-by-state basis. Since product liability insurance rates are set on the basis of a nationwide experience rather than individual state experience, variations on a state-by-state basis will impact adversely on the goal of achieving affordable and stable product liability insurance rates. Through a clear understanding of their product responsibilities as set forth in the Federal bill, manufacturers will no longer be reluctant to develop new and innovative products which will be distributed throughout the country. Litigation costs will be substantially reduced through elimination of the costly process of determining conflicts of law issues and defining which principles of law are applicable. We believe that the only way to alleviate these problems is to enact this tort reform legislation on a nationwide basis, thereby insuring uniformity and stability in the law of product liability and hastening the implementation of this much needed reform.

Understanding that the product liability problem in the workplace is a serious impediment to interstate commerce requiring Federal legislation, we believe that S. 44 is an appropriate response to that problem. The interaction of Section 9, Comparative Responsibility, Section 10, Misuse, Alternation, Contributory Negligence or Assumption of the Risk, and Section 11, Effect of Worker Compensation Benefits, should bring balance to the workplace product liability compensation system. The responsibility of the careless employee and careless employer will be weighted in apportioning responsibility between the persons involved.

The comparative responsibility principles reflected in Section 9 of S. 44 still effectuate the policy underlying the adoption of product liability laws while providing for a more fair and equitable approach to the problem. Moreover, by holding manufacturers liable only for their own degree of fault, comparative principles will help alleviate the product liability insurance problems. The advantages of a comparative responsibility approach are reflected in the growing trend among the states to apply comparative fault principles in product liability actions as well as in scholarly commentaries which have increasingly urged the application of comparative responsibility.

Comparative responsibility principles in product liability actions further the interests of both injured plaintiffs and product sellers. The product seller's interests are advanced because he is not required to absorb liability to an extent greater than his culpability. At the same time, the interests of the product user are furthered because he can recover partial damages if he has misused the product and if the product seller is also at fault.

The application of comparative responsibility principles to product liability actions will in no way undermine the policies which are advanced through a product liability system. The plaintiff's burden of proof will not be significantly altered by the imposition of a comparative responsibility approach in all products liability cases. Moreover, if comparative responsibility is adopted in product liability actions,

the manufacturer will not be absolved of liability; the motivation to make a safer product will not disappear. It is true that the manufacturer's exposure to liability will be lessened to the extent that the plaintiff's conduct contributed to the injury, but it is also true that the manufacturer's exposure may be increased when a plaintiff who is normally barred from recovery under assumption of risk or contributory negligence is allowed some recovery as a consequence of any fault on the part of the defendant manufacturer. Without comparative responsibility, the requirement that the product seller pay all damages provides no incentive to regulate a product user's conduct. By allowing the injured claimant to recover part of his damages from the product seller, and thereby aligning liability with fault, the conduct regulating aspect of liability is maximized for both the product seller and the product user.

The application of comparative principles is especially important in the context of the workplace. Employer exclusivity provisions of workers' compensation statutes do not allow an employer to be impleaded in a product liability action. Nor is a third party able to seek contribution against the employer, because implicit in the decision of the state legislature to adopt a workers' compensation statute is the judgment that employers should not be liable for costs in excess of the established workers' compensation ceiling. A majority of jurisdictions will not even allow an employer to be named as a party to an action involving a work related workplace injury even though the negligence of the worker's employer contributed to that injury. The provisions of the draft bill which provide for comparative responsibility strike an equitable balance which preserves both the efficient allocation of liability and the statutory ceiling on an employer's liability under workers' compensation. It also ensures that an injured plaintiff is quickly and reasonably compensated for all injuries caused by defective products.

Section 9(b)(2) is the core of the comparative responsibility provision. Without this paragraph the current injustice will be perpetuated in the workplace product liability compensation system. Under the bill as written, where the claimant's employer or co-employee is at fault, damages shall be reduced by the amount of workers' compensation benefits paid and payable (Section 11(a)) or by the percentage of responsibility apportioned to the conduct of such employer or co-employee, if that amount is greater. We believe that this provision is fair to the employee in that he received workers' compensation benefits as payment for any injury which may have been caused by his employer or co-employee. In exchange for this no-fault payment of benefits the employee has given up his court action against the employer or co-employee. Having been compensated for the injury caused by his employer or co-employee by workers' compensation, he should not be able to recover again for that injury from a product seller who has no culpability in the accident. Recovery of damages from a product seller should be limited to that portion of fault attributable to the product seller's actions. The basic principles of the workers' compensation system are therefore integrated with product liability law through Paragraph 9(b)(2) of S. 44.

Section 10 of S. 44 contains important provisions concerning misuse or alteration of products, contributory negligence or assumption of the risk. After the product has left the manufacturer's plant, the manufacturer has no control over misuse, alteration, or modification of the product. Surveys have indicated that in excess of 58 percent of workplace injury payments have been made where the injury may have been caused by employer negligence and that 65 percent of the injured employees did not receive adequate training from their employers on how properly and safely to operate the machines. Furthermore, the statistics also show that over 1/4 of all workplace accidents occur during a worker's first six months on the job.

In a survey of the National Machine Tool Builders Association, it was found that in only 13 percent of the workplace product related accidents could a case be made for some sort of mechanical failure of the machine itself. Many of the machines had been modified one or more times by the employer and/or the person or persons he bought the machine from. The study shows that 18 percent of these machines were poorly maintained by the employer. Sixty-three percent of the time the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred because he failed to make sure that his employees used the appropriate safety device. These statistics verify the need for Section 10 in S. 44.

Section 11 helps to rectify the unfairness of the current system where the manufacturer of the workplace product pays the costs of a product related workplace injury and is unable to place any portion of the cost of the injury on an employer whose negligence may have helped bring about the claimant's injury. It focuses on one of the primary criteria utilized in this draft bill which is to place the incentive for loss prevention on the party or parties who are best able to accomplish that goal. The present system operates contrary to that principle and creates a disincentive

for the employer to keep workplace products safe. Currently in many states a workers' compensation insurance carrier or employer may assert a lien against the claim of an injured party who received workers' compensation benefits and prevailed in a product liability lawsuit. The carrier and/or employer could thereby recover those paid benefits. This system encourages complacency by the workers' compensation carrier and the employer because it removes a monetary incentive for active involvement in safety procedures and injury prevention. Instead, the incentive focuses on an employer or an insurance carrier promoting a lawsuit by the injured party so that the carrier or employer could be reimbursed out of the plaintiff's recovery. Consequently, many lawsuits are instigated not by the injured party but by the employer or its workers' compensation insurance carrier advising the employee that he may get large (but generally ephemeral) recovery for pain and suffering not compensated by workers' compensation. We believe that this has contributed substantially to the large volume of product liability lawsuits. Section 11 should eliminate employer and insurance carrier subrogation to product liability lawsuits and thereby create a monetary incentive for them to emphasize safety and injury prevention in the workplace. Plaintiffs with good claims against third parties would not be barred by the section.

While Section 11 will overrule the current majority rule, recognized scholars in the field have long been calling for this change as being an equitable solution to the problems caused by the current law which will involve the least transaction costs. We are also beginning to see a similar tendency in the courts to seek a basis for holding the employer accountable for its negligence in causing workplace injuries.

We also applaud the efforts of the drafters in writing the provisions of Sections 4, 5, 6 and 7. We support the objective criteria established for standards of responsibility for manufacturers. This has involved the difficult task of codifying the current law of liability for defective construction, defective design, inadequate instructions, and express warranty. While we might disagree with some of the criteria, on balance we think that the drafters did an excellent job; and we support the standards as being fair and reasonable. While design and duty to warn cases are placed on a fault basis, it is important to note that the factor of hindsight is eliminated by the trier of fact focusing on the manufacturer's ability at the time of manufacture to be aware of the product's danger and the practical technological feasibility at that time of eliminating the danger or warning against it.

Section 12 of S. 44, providing a time limitation on liability, represents a positive advance in the direction of fairness. However, we believe that the 25-year time limitation for claims brought for harm caused by capital goods is too lengthy and should be shortened to ten years. The volume and expense of maintaining detailed records for 25 years "just in case" a product liability suit is brought against a 25-year old machine is not a fair or practical requirement. Designs and technology drastically change, thereby rendering much of the information virtually useless.

Twenty-one states have already enacted statutes of repose for product liability suits. The periods of liability in these statutes vary from 6 to 12 years. The shortest statutes of repose currently enacted recognize the need to balance complete records and personnel availability against the cost of record storage and unavailable contributors to the design and production of the manufactured goods. They also acknowledge the responsibility of a product owner to properly maintain his equipment. Few machines can continually be operated for years without servicing. In addition, few mechanical or design defects will remain hidden beyond ten years. Since 83.5 percent of all bodily injury accidents occurring from capital goods happened within ten years of manufacture, very few cases would be affected by a ten-year statute of repose. (44 Fed. Reg. 62733 (1979).) Furthermore, most purchasers who use the product beyond ten years are thoroughly familiar with the product, and if it has been properly serviced, no injuries should occur. If a product defect or a worker injury has not manifested itself within those ten years and subsequently the purchaser is injured while working with the product, the purchaser's disregard for his or her employee's personal safety is the likely proximate cause of the injury.

A ten-year statute of repose will reduce transaction costs as well as lawsuits, since most claims on overage equipment result in judgements in favor of the defendant. While the number of actual judgements in favor of plaintiffs are de minimus, the number of claims filed are substantial. The ten-year statute of repose would eliminate this needless and fruitless litigation.

In conclusion, we believe that the S. 44 product liability legislation is a highly professional, well thought out, and articulate approach to a very complex problem. It provides valuable guidance to the courts which are presently facing a changing and often conflicting array of case law and statutes constituting "product liability law" in the various states today. Both product sellers and consumers should benefit

substantially from the passage of this measure at the Federal level. We would be glad to offer our assistance to gathering additional data or in the legal/technical aspects of the proposal. It is important that Federal product liability legislation be enacted as soon as possible. We urge your passage of the legislation without delay.

STATEMENT OF JULIAN C. MORRIS, PRESIDENT OF AUTOMOTIVE PARTS & ACCESSORIES ASSOCIATION, INC.

The Automotive Parts and Accessories Association (APAA) is a trade association located in Washington, D.C., comprised of about 1400 manufacturers, independent manufacturers' representatives, distributors, and retailers of automotive parts and accessories sold primarily, but not exclusively, in the "aftermarket." The aftermarket supplies automotive products manufactured and sold independent of the original auto manufacturers.

The aftermarket is vital to this nation's economy, providing at least double the employment of the vehicle manufacturers and their dealers. We are hundreds of thousands of medium and large, but mainly small manufacturers and others located in every state of the union producing and selling domestically in excess of \$54 billion parts, accessories and chemicals annually.

First of all, I would like to state our support for S. 44 introduced by Senator Kasten and others on this Committee as approaching a sound and balanced solution to our product liability problems. We would like to take this opportunity to explain our industry's product liability problems and state some of our recommendations for a uniform product liability bill.

Mr. Chairman, members of our industry have been plagued by the high cost of product liability insurance since the early 70's when the definition of strict liability was expanded for product liability cases. The expanded concept seemingly imposed on manufacturers the sole responsibility of injuries caused by their products, often regardless of mitigating factors.

Liability can be imposed on the manufacturer even if the manufacturer uses good judgement and good materials in the manufacture of the product. The plaintiff only has to show that a product was the cause of an injury. He does not have to prove necessarily that the manufacturer was negligent in design or preparation. Currently the manufacturer is held liable if there is a design defect creating concealed danger, misrepresentation of character or quality of the product for advertisements, failure to test and determine normal wear and tear, and failure to give adequate warnings or clear directions.

The duty to warn, often a critical factor in product liability cases, has been expanded to products which are manufactured properly, but which may become dangerous if misused. Manufacturers have been held liable for uses or modifications of their products for which the products were not intended, but which caused an injury. In 1977, the Texas Supreme Court ruled in favor of a plaintiff for injuries sustained in an accident when the butterfly valve of a defective truck carburetor locked in an open position. The driver had previously removed the original GM-carburetor and made 11 changes to it (improper bolt, clamps, etc.) and then reinstalled it. The court ignored the jury findings that the reinstallation was a misuse which caused the accident and awarded the plaintiff \$1.3 million.

The manufacturer has little control over how a product is used, and thus is put into the unfair and untenable position of having to fathom the unfathomable. This is caused in large part, by a tendency of the courts to designate as liable the party who can most afford to pay. In many cases, despite overwhelming evidence of improper use or negligence on the part of the user, the manufacturer gets saddled with the punishment because the court or jury feels that the manufacturer's assets are greater than the injured party's.

This economic theory of "justice" not only threatens the impartiality of the legal system, but also discourages responsible actions on the part of both product manufacturers and product users.

Furthermore, the current economic climate and its effect on business calls into question this "deep pocket" theory. Many companies are in serious financial distress—a condition exacerbated by the added burden of unfounded liability suites.

The number of product liability suits have increased significantly over the past 10 years as a result of the expanded definition of strict liability. The number of product liability cases for motor vehicles has increased in federal courts alone from 350 in 1979 to 556 in 1982. The monetary awards also have increased, forcing insurance companies to increase their premiums, sometimes by thousands of percent. This is particularly apparent in high risk industries.

High risk industries are those which are more susceptible to suits than others. The automotive parts industry is among them. Since insurance companies set rates based on aggregate rather than individual company risk, it is possible—indeed it has happened repeatedly—that a company has no claims against it but is termed high risk because others in the industry have been hard hit by suits. As a consequence, such company then may be unable to obtain affordable insurance. The smaller manufacturing firms that constitute the mainstay of APAA members can least afford to pay exorbitant premiums, least afford the capital drain of self-insurance, and least afford the risk of having no insurance at all.

Part of the problem for both manufacturers and insurance companies also is caused by the myriad of differing state laws. Although some states have enacted product liability "reforms," the overall picture has changed little. Most manufacturers function in interstate commerce, just as insurance companies set their premiums from a national perspective. The nature of the distribution system in our industry often makes it impossible for manufacturers to know the destination of their product after it leaves the distributor. The predictability of risk will be enhanced and the product liability problems of business will be mitigated only with reform on the federal level applicable to all states.

A federal uniform product liability law is needed to clear up the inconsistencies and correct the inefficiencies in the present tort system. The current confusion over product liability causes manufacturers to restrict innovation, and raise prices to cover escalating premiums set under uncertainty by insurance companies.

APAA has five key recommendations which we feel should be incorporated into federal uniform product liability legislation. We are pleased to see most of these recommendations in S. 44, however our first two points are not and we urge you to consider them. I would like to take this opportunity to explain our recommendations and relate them to S. 44.

1. A statute of repose which runs 10 years from the date of manufacture. In states with no statute of repose, manufacturers and sellers of allegedly defective products often are confronted with liability for supposed defects which are due not to defective manufacturing, but rather to the length of time the product has been used and ordinary wear through use. The manufacturer should have a limited time of liability exposure except in express warranty situations and other cases where the effects, such as in the case of drugs, could take years to become apparent.

S. 44 currently contains a 25 year time limitation on liability; however, it is limited to capital goods and inexplicably excludes motor vehicles. Further, there is no statute of repose for consumer products. The refusal of the framers to cover motor vehicles and thus the parts thereof under any statute of repose, deeply troubles our members. Although APAA recognizes this is both a controversial and emotional issue, we feel that the effectiveness of the bill is significantly dissipated by the failure to include a statute of repose for consumer products and to cover commercial vehicles under the capital goods statute.

Many states do have a statute of repose on consumer goods. However, these statutes vary in length from state to state. By failing to unify the statute under a federal standard, some predictability of exposure with which insurance companies could base their rates is lost. By ignoring this opportunity, we fail to be guided by the purpose of S. 44: to unify the law in the interest of better interstate commerce and legal simplicity.

APAA feels that a ten year provision would be more than adequate since most auto parts defects appear in the first two years of use, the average life of a car is only 6.8 years, and most defects in consumer goods according to the Interagency Task Force on Product Liability appear in the first ten.

2. Limitations on contingency fees for attorneys in product liability cases, and a call for reasonable awards with limitations on non-economic losses such as pain and suffering, loss of personal services, etc., and elimination of punitive damages. In most jurisdictions, there is no limitation on the amount of contingency fees received by attorneys in product liability cases. Many lawyers will take cases on a contingency basis and only charge the client a percentage if he wins. Coupled with the courts' inclination to favor the injured regardless of fact, this has caused an undue increase in the number of suits filed.

We understand that contingency fees give people who could not otherwise afford to sue, the opportunity to do so; however, we feel that some contingency fee limits would help to curtail the number of frivolous suits brought against manufacturers and in doing so, help restore some reasonableness to product liability litigations.

We also recommend a limit on so called "non-economic losses" such as pain and suffering. These are highly subjective judgements—juries understandably are

swayed by a man in a wheel chair even though the man may be responsible for his own injury.

There is no limit on contingency fees in S. 44. We recommend that a limit be added. Punitive damages are limited in the bill to cases where there was a reckless disregard for the safety of the product user. We concur. The bill also sets specific guidelines on the setting of punitive damages when they are appropriate. APAA feels that these guidelines will help to limit punitive damages to deserving claimants and to reasonable amounts.

3. Elimination of manufacturer/seller liability if a product is defective only because the end user modified it, or put it to some use for which it was not intended. It is unfair that manufacturers of consumer goods should be required to become blanket insurers of the safety of their products when a product is put to uses not intended nor reasonably anticipated. This occurs in our industry constantly as automotive parts are taken from "junkyards" and placed on other automobiles for which they were not always intended.

Section 10 of S. 44 states that if misuse or alteration is caused by the claimant, the claimant's damages shall be apportioned to the extent that the misuse or alteration was a cause of the harm. We feel this adequately covers the problem.

4. State of the art considerations making it impossible to apply present day standards to products built years ago in conformance with then existing standards. A part built to the state of the art ten or twenty years ago should not be judged according to today's standards. Automobile technology makes considerable advances every year. A company which builds its reputation on parts that "last" should not be penalized just because the state of the art had progressed.

We believe that this is covered in Section 5(b) which states that "a product is unreasonably dangerous if, at the time of manufacture of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design that the manufacturer used."

5. A definition of a product is defective only when the defect made it unreasonably dangerous when manufactured or sold. This would prevent the courts from making manufacturers liable for the unreasonable use of a product. Currently, a plaintiff is required to establish that the condition of the defendant's product was defective and unreasonably dangerous, and that this condition proximately caused the plaintiff's injury. The term "unreasonably dangerous," however, admits a wide variety of interpretations. The definition should be limited through some notion of ordinary and reasonable use, age of the product in question, and user modification.

Section 4(a) of S. 44 defines unreasonably dangerous and provides specific conditions which must be established in order for a manufacturer to be held liable. These conditions would significantly clarify manufacturers' responsibilities in product liability suits.

In addition to the five points above, we also feel that adherence to federal government standards should be included in the bill, as a rebuttable defense. This would help juries to judge whether a product was safely manufactured. Such a provision would have the added advantage of encouraging compliance with federal safety standards.

In conclusion, we commend Senator Kasten and this Committee for their dedication to developing legislation which approaches a balance between both industry and consumer interests. However, we would also like to caution this Committee on the possibility of S. 44's effectiveness being steadily eroded during consideration by this Committee, full Senate and House. We know that proposals must be modified in order to meet the needs of many groups, but we ask that you continue to keep in mind the needs of industry as well as consumers so as to keep the bill well balanced and fair. The product liability problems can and should be resolved. We strongly recommend expeditious passage of S. 44 with the few amendments we suggest here.

STATEMENT OF THE SPORTING ARMS & AMMUNITION MANUFACTURERS' INSTITUTE

The Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI"), a trade association of sporting arms and ammunition producers, supports Federal legislation to reform product liability law.

SAAMI is gravely concerned about the trends in product liability litigation over the past two decades and the impact of such litigation upon the industry and its customers. As responsible corporations, SAAMI's members recognize and accept their obligation to take due care in the design and manufacture of their products.

S. 44, as introduced by Chairman Kasten, would not alter that basic obligation. Rather, the proposed legislation would provide a uniform and more rational basis for consumer redress if that obligation is not met.

By providing a clearer basis for manufacturers' liability, the legislation would reduce the flood of unreasonable product liability litigation which has placed a burden on industry and ultimately the consumer. Extreme examples of such litigation include numerous suits against firearms manufacturers in which plaintiffs attempt to hold manufacturers liable on the ground that their products, admittedly not defective, are by their very nature excessively dangerous and even a suit seeking to impose liability upon a manufacturer for loss of earnings to the plaintiff due to the fact that he was imprisoned for manslaughter. In an April 1982 symposium on product liability law reform, Professor James A. Henderson, Jr., of the Boston University School of Law described such cases as "outrageously unwarranted."

As outrageously unwarranted as they may be, the cases are filed and must be defended. Even if the defense is wholly successful, the company defending the suit will incur substantial costs. The costs, though entirely nonproductive, are a cost of doing business which inevitably affect the cost of the industry's products.

Certain provisions of S. 44 are particularly noteworthy and SAAMI strongly supports those provisions. First, the bill properly sets out a negligence standard to govern alleged design defects (Section 5) and, similarly, a fault-based reasonableness standard for cases involving product warnings or instructions (Section 6). While the standards of Sections 5 and 6 reflect prevailing state law, their codification would provide a degree of certainty as to future developments and should reduce the number of unwarranted product liability cases.

Second, S. 44 (Section 14) limits the use of evidence of subsequent remedial measures to the limited circumstances of impeaching a witness who has testified that such measures are feasible. This counters a trend toward allowing the use of such evidence in product liability litigation and recognizes the important social policy that had generally precluded its use in the past. That policy is that manufacturers should not be deterred from improving their products for fear that those improvements will be the basis for product liability claims relating to product previously made.

And, third, the bill (Section 11) provides a set off against damages awarded in litigation for benefits received by the victim from any workmen's compensation law. While victims should be fully compensated for their injuries consistent with reasonable standards for manufacturers' responsibility, they should not receive a windfall double recovery from both a product liability suit and workmen's compensation.

SAAMI believes that S. 44 could be improved in important ways. First, while SAAMI applauds the provisions restricting excessive punitive damage awards, a further limitation, placing a cap on the total amount of punitive damages which may be awarded, should be added. The threat of severe economic injury is very real, particularly for smaller companies. Further, concern over excessive punitive damages may inhibit on-going evaluation of product design since the results of such evaluations may be cited as a basis for a claim for punitive damages. A cap on punitive damages could be absolute, tied to the amount of compensatory damages, related to the financial ability of the defendant, or a combination of the foregoing.

Second, a ten year statute of repose for all products, not just capital goods, should be included. In the report on S. 2631 in the 97th Congress, the Committee stated that the provisions of Section 12 were limited to capital goods because "the 'long-tail' problem is most severe for capital good which have a longer life than consumer goods." S. Rep. No. 97-670, at 51. Many consumer goods are extremely durable, equally if not longer lasting than capital goods. That is certainly true for firearms. A properly maintained sporting firearm has an indefinite useful life. Further, SAAMI agrees with the commentators cited in the report (at 51-52) that Federal law should follow prevailing state law with a 10-year limitation.

Third, the concept of "enterprise" or "market share" liability should be precluded. SAAMI believes that such concepts are wholly inconsistent with the social objectives of product liability law and that a plaintiff should be required to establish that the defendant manufactured the particular product which caused the harm.

Finally, SAAMI urges that compliance with government specifications or standards be least a "presumptive" defense in cases alleging a product design defect. SAAMI acknowledges, as stated in the Committee report in the 97th Congress (at 13), that there are diverse views on the issue. However, SAAMI believes that appropriate provisions can be drafted which protect a manufacturer from liability for adherence to mandatory standards but do not shield the manufacturer from the consequences of its own negligence.

The need to reform product liability law is clear. SAAMI earnestly requests that the Subcommittee support S. 44, with the modifications suggests in the interest of industry and the consumer.

STATEMENT OF THE FLEXIBLE PACKAGING ASSOCIATION

The Flexible Packaging Association (FPA) is pleased to have this opportunity to submit its views of S. 44, the Product Liability Act. FPA is the national trade association representing manufacturers of flexible packaging and suppliers of materials and services used to manufacture such packaging.

Flexible packaging is produced from paper, plastic or cellulose films, aluminum foil or a combination of such materials. It is used to store, protect and display all kinds of fresh, processed or prepared foods and other products. It ranges from simple paper over-wraps and plastic bread bags to sophisticated composite material pouches in which foods can be directly sterilized and processed. There are more than 900 flexible packaging plants in the United States which are responsible for producing over 100 billion packages a year. The Association represents nearly 80 percent of the flexible packaging sold in the United States.

The Flexible Packaging Association commented in support of S. 2631, which was reported favorably out of this Committee last fall. FPA supported that bill and supports S. 44, since it believes that a federal product liability act is the only feasible way to bring needed uniformity to product liability law.

Product liability law has traditionally developed independently in each of the fifty states. As a result, manufacturers and product sellers involved in interstate commerce face the impossible burden of reconciling their business practices to the varying laws, standards of care and rules of liability in each of the states in which they do business. Further, since tort law has traditionally been a matter for judicial activism, manufacturers also face the problem of being unable to predict when a particular standard in a given state might change by judicial fiat.

The uncertainty in product liability law has created an inordinate burden on manufacturers and product sellers, resulting in higher costs and lower productivity. This uncertainty burdens consumers as well. An injury may be recoverable by a consumer in one state yet not in another, resulting perhaps in a windfall for some and denial of compensation for others. Thus, it is FPA's view that adoption of a federal product liability act is required to remove this uncertainty. Neither manufacturers, product sellers nor consumers can afford to wait for the slow and tortuous process of state-by-state reform.

In substance, FPA believes that a return to a fault-based standard of liability for manufacturers and product sellers should be the lynchpin of a federal product liability act. Elimination of strict liability, particularly in design defect and failure to warn cases, will simply return to a generally understood and reasonably applied concept of liability, one which has been the cornerstone of tort jurisprudence in the United States. FPA believes that strict liability has failed to encourage product safety; on the contrary, since under strict liability manufacturers who have used all due care in manufacturing and distributing a product are not shielded from liability, strict liability may actually be a disincentive to product safety.

In FPA's view, elimination of strict liability and a return to a fault-based standard of liability in a federal product liability bill should be accompanied by the adoption of the defense of misuse or alteration as well as the concepts of comparative liability. The federal product liability bill should provide that product users who have altered or misused products must bear the appropriate proportionate responsibility for their actions. The manufacturer or product seller who has used reasonable care in designing or distributing products, using the generally accepted technology at the time of manufacture, and who has provided the user with warnings and instructions reasonably calculated to point out hazards involved with the product, its use or effect, should be held to have satisfied the appropriate standard of care.

FPA also believes that compliance with standards, particularly government standards, should be a complete defense in product liability cases. Such standards are normally developed after consideration of the input of consumers, manufacturers and government officials, and reflect a consensus on the appropriate standard of care required of manufacturers. Consumers can reasonably expect such standards to be met; accordingly, compliance with such standards should bar liability.

Finally, FPA believes that punitive damages should be eliminated in civil product liability suits, as they serve no appropriate purpose. If, however, punitive damages are allowed, they should be based on clear standards, and a maximum ceiling should be set.

For the above reasons, FPA supports S. 44, as it believes this bill will reduce uncertainty and insure uniformity in product liability law in a manner which will ultimately benefit manufacturers, product sellers and consumers. Adoption of a federal standard will increase certainty of business planning, provide parties with clear standards of conduct which will ultimately encourage appropriate settlements and discourage unmeritorious suits, and aid in streamlining the judicial process.

STATEMENT OF PRESTON M. GREEN, PRESIDENT, ASSOCIATION OF STEEL DISTRIBUTORS, INC.

Mr. Chairman and members of the Subcommittee, I am Preston M. Green, president of the Association of Steel Distributors, Inc. (ASD), and President of Southwest Steel Supply Co., Inc., St. Louis, Missouri. ASD, with headquarters in Cleveland, Ohio, is a national association of steel service centers which buy steel from steel mills, process it and sell it to manufacturers, contractors, fabricators and other end users. Its members, located all over the United States, collectively employ more than 9,000 persons, handle almost 6.5 million tons of steel annually, and produce nearly \$2.6 billion in annual sales.

ASD commends the Subcommittee for its efforts with respect to S. 44 and its predecessor, S. 2631. We concur in the following introductory remarks of Senator Kasten, wherein he explained the need for such legislation.

"Product liability became a serious problem in the mid-1970's and it continues today. The uncertainty and instability in product liability laws has become a major problem not only for manufacturers and product sellers, but also for consumers. Conflicting product liability rules have made it extraordinarily difficult for consumers to know their legal rights and for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers."

ASD generally supports S. 44. However, there are clarifications we would like to see made. The three points we wish to make are:

- (1) There is a need for federal product liability legislation.
- (2) S. 44 should be clarified to confirm that product sellers/distributors are not to be treated as product manufacturers due to modifications of product size or form to meet customer specifications.
- (3) Product sellers/distributors should not be liable for claimant harm caused by manufacturers.

1. *There is a need for federal product liability legislation.*—The rules determining the liability of product manufacturers and sellers/distributors for product-related injuries have been developed almost exclusively by judges on a case-by-case basis. These decisions have been based upon separate laws in each of the fifty states. The result has been not one but fifty separate laws relating to product liability. Each has its own theories of liability, defenses and procedural requirements. Thus, product liability law is a "crazy quilt" that is constantly changing, totally unpredictable, and highly inconsistent.

This has imposed a significant burden on manufacturers and sellers/distributors of products. This burden cannot be justified on the basis of consumer benefit, since the public is ill served by a complex of laws that is so complicated and inconsistent that the average citizen cannot determine his or her rights to redress for defective products. Consequently, there has been a rapid increase in the number of long and costly product liability lawsuits. This serves neither manufacturers and sellers/distributors faced with the threat of highly excessive awards, nor consumers who must frequently wait for years for the redress of legitimate claims. The groups primarily benefiting from the confused state of the law regarding product liability are attorneys who both prosecute and defend such claims in the courts. As Rep. Henry Waxman has stated: "the current patchwork of fifty different states' laws on product liability causes confusion, conflict, and unnecessary costs for everyone involved."

For these reasons, ASD supports the Subcommittee's efforts to enact a uniform law which would clarify the responsibilities of product manufacturers and sellers/distributors as well as the rights of product consumers.

2. *S. 44 should be clarified to confirm that product sellers/distributors are not to be treated as product manufacturers due to modifications of product size or form to meet customer specifications.*—ASD applauds the inclusion of the word "distribute" under the definition of "product seller" in section 2(11) of S. 44. However, we urge the Committee to amend the definition of a product seller in order to confirm that product modifications by distributors to satisfy customer requirements as to size or form do not constitute product manufacture. In the case of steel service centers or

steel distributors, the size or form of steel purchased from steel manufacturers is often changed to meet customer specifications by shearing, slitting, sawing, flame-cutting or decoiling. These are minor operations, but ones which might lead to unnecessary and inappropriate product liability litigation against steel distributors unless the definition of a product seller is clarified. Consequently, we urge the Committee to amend section 2(11) as follows (new language underlined):

"(11) 'product seller' means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, blends, packages, labels, markets, repairs, maintains or *adds value in a way which does not change the basic nature or uses of the product*, or otherwise is involved in placing a product in the stream of commerce; but does not include—

"(A) a seller of real property;

"(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

"(C) any person who—

"(i) acts in only a financial capacity with respect to the sale of a product; and

"(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;"

In addition, we urge the Committee to include the following language in its report with reference to the definition of a "product seller" in section 2(11) of the bill:

"The Committee intends that the definition of a "product seller" includes such entities as steel distributors who purchase products from manufacturers for resale and, prior to resale, modify the product size or form to meet customer specifications."

3. *Product sellers/ distributors should not be liable for claimant harm caused by manufacturers.*—ASD supports the reasonableness standard related to manufacturer responsibility contained in section 8(b) of S. 44 as well as the standard of comparative responsibility contained in section 9 of the bill. These standards are based on a fault—rather than an insurance—concept of product liability. Therefore, we endorse the Committee's statement in the report on S. 2631—the predecessor of S. 44—that "the seller is responsible only for his own fault."

However, section 8(e) of S. 44 conflicts with these concepts. It provides that where a manufacturer is not subject to service of process or is determined to be judgment proof, the product seller/distributor is liable for claimant harm attributable to the manufacturer. This provision is inequitable on its face, since it makes product sellers/distributors the insurers for claimant damages caused by manufacturers.

As noted by the Committee in its report on S. 2631, at p. 38, non-manufacturing product sellers account for only about 5 percent of product liability payments. This is not surprising, since they neither design nor manufacture the product and are not at fault for product injuries caused by design or manufacturing defects. To force product sellers/distributors to stand in the place of product manufacturers unfairly burdens them with litigation and insurance costs that would be unnecessary in a fault-based system. Therefore, we urge the Committee to delete subsection 8(e) of S. 44.

CONCLUSION

The manufacture, distribution and sale of consumer products increasingly serves a nationwide market and, therefore, is subject to widely varying state statutes and case law. Preemptive federal legislation to establish uniform national standards is clearly needed to restore order to product liability law. ASD commends the Subcommittee for its efforts and urges it to report legislation which reflects the concerns we have expressed in this statement.

STATEMENT OF THE ALLIANCE OF METALWORKING INDUSTRIES

The Alliance of Metalworking Industries (AMI) is a coalition of six national trade associations. Each association represents a different segment of the contract metalworking industry.

Companies represented within AMI employ over 880,000 people in nearly 20,000 manufacturing plants. Combined sales exceed \$34 billion annually.

Members of AMI include: American Metal Stamping Association, Forging Industry Association, Metal Treating Institute, National Screw Machine Products Association, National Tooling & Machining Association, and the Spring Manufacturers Institute.

The workplace product liability problem has its greatest impact on small business, including those in metalworking. These companies have great difficulty following the development of product liability law in each of the states where they ship products. Frequently, they are subcontractors and, hence, do not always know where, or for that matter, in which end product their component parts are used.

Small businesses are the least able to afford the massive increases in product liability insurance premiums experienced by American businesses in the recent past when court decisions in some states led to increased insurance costs throughout the country. At the same time, small businesses, if uninsured or underinsured, are also least able to bear the burden of heavy product liability losses.

The current situation of laws being unevenly developed and interpreted by legislatures and courts in 50 jurisdictions has led to uncertainty and unpredictability. In some states, liability has been expanded beyond a fault-based tort system and towards the imposition of a compensation-based tort system of absolute liability for product related design decisions. This has resulted in inordinately high costs for small businesses, not the least of which are an avoidance of innovation and an inhibition to competitiveness.

The member companies of AMI support S. 44, the Product Liability Act, because they believe it is a balanced bill that will create a set of product liability litigation rules that everyone would be able to understand: product sellers, consumers, labor unions, employers, lawyers, and judges. The uniformity provided by a federal tort statute would bring predictability to insurance rate-making thus stabilizing, if not reducing, product liability insurance premiums for most small businesses.

AMI was particularly pleased to see that Section 11(d) of the legislation would firm the exclusive remedy doctrine of workers' compensation systems throughout the country. This "no fault" concept, which formed the original foundation for workers' compensation systems in the early 1900s, is critical to ensure that employees receive sure, prompt, and reasonable compensation for all work-related injuries.

Over the past decade, state courts have gradually eroded this exclusive remedy doctrine to the point where an employer could face an expensive court proceeding at the will of an aggressive plaintiff's attorney. California has recently passed a law which permits employees, injured under certain circumstances on power presses, to sue their employer directly for damages above and beyond workers' compensation. New York is also presently considering legislation which would permit an employee to seek punitive damages when safety violations occur.

None of these institutions seeking exceptions to exclusive remedy have considered that "serious and willful" provisions already exist within workers' compensation systems to penalize irresponsible employers. Additional means of recovery simply weaken the system and potentially threaten responsible, safety-minded employers as well.

Attached to this testimony in support of S. 44 is a summary of testimony delivered by one of our members to the California Assembly in an effort to repeal California's controversial law regarding power presses. Consideration of this testimony by the Committee will detail the problems caused by exceptions to exclusive remedy and illustrate the necessity of Section 11(d) in the Product Liability Act.

Member companies of AMI manufacture everything from large special machines to small springs. They feel that the statute of repose in the legislation should apply to all products and not just capital goods. This is because any product can be the cause of a product liability action. The statute should also be applicable to all actions and not just cases involving design liability or failure to warn liability.

A statute of repose is especially important to AMI member companies that do manufacture capital goods. Currently, companies are defending products that are over 40 years old, which have been altered, misused, and not properly maintained. Sometimes the products have changed owners several times, or were manufactured by another company that the manufacturer purchased years before. Knowing that cases are being tried involving such circumstances prevents a company from planning its affairs with any certainty.

A ten-year statute of repose, with an exception made for cases involving fraud, would be fair. Rarely does a product that has been properly used and maintained cause an injury due to the failure of a manufacturer to fulfill his original responsibilities when the product has already been functioning well for such a long period of time. If there are to be additional exemptions, than a longer statute of repose in those cases could be offered.

Approximately 5 percent of the AMI membership is involved in government contracting. Though this figure is small, it is growing. Studies have shown that an increase in the number of small companies manufacturing products for the government would result in substantial cost savings for the government. Small companies

can generally produce for less due to their lower overhead and costs. In addition, opening these contracts up to small businesses would mean more of them could obtain their own contracts directly from the government, thus reducing the added costs involved when contracts go to large corporations that, in turn, subcontract the work out to our members.

For these reasons, it is very important that the legislation include a presumption that a product manufactured to the specifications of a government contract is not unreasonably unsafe in any way. A federal contract is quite specific in terms of its required design and construction. The process involved in developing a product for government use is such that any duty to warn is certainly detected prior to the contract being let. To hold a business liable is to place upon it an unfair burden because the manufacturer is not free to amend the design or alter the construction as he is when manufacturing a product of his own creation. If the product does not meet the contract's specifications, he is not in compliance and is liable. Conversely, manufacturing to the government's specifications should remove his liability.

As frequent subcontractors to larger companies who in turn produce goods for both the private and government sectors, our members also feel that the legislation should specify that the entity responsible for a product's design and the construction decisions should be liable for any harm caused by that product. As with government contracts, the subcontractor is usually not in a position to alter any aspect of a component that he feels may be reasonably unsafe. Frequently, he is not even in a position to know the final use to which his product will be put and subsequently may be unable to detect its unsafe aspects. Though usually such claims are dismissed, specific liability in these situations would help reduce the number of times they are brought into a case in the first place.

The members of AMI would like to thank Senator Kasten for his leadership in attempting to solve the growing product liability problem. We stand ready to be of assistance in any way.

STATEMENT OF LOUISE G. TRUBEK, EXECUTIVE DIRECTOR, CENTER FOR PUBLIC REPRESENTATION

Senate Bill 44 seeks to pre-empt state product liability laws under a comprehensive federal statute.

What does this mean for the Wisconsin consumer?

S. 44 will create significant doctrinal and procedural changes in Wisconsin's product liability laws. Generally, these changes will curtail the rights of injured consumers and reduce incentives for industry to create safer products.

S. 44 will eliminate strict liability cause of action for anyone harmed by a defectively designed product or by the failure to warn of a defect. Plaintiffs will have the often difficult burden of proving negligence in these cases. The Bill will also resurrect industry standards defenses in negligence cases, which could only encourage industry-wide negligence in high concentrated industries.

This proposed legislation will also create product misuse and alteration as formal defenses for manufacturers. A plaintiff's recovery will be reduced to the extent that their use was inconsistent with instructions or reasonable use. This would subtly shift the emphasis from the manufacturer's behavior (e.g., foreseeability of a product's danger) to the plaintiff's behavior, making recovery more difficult.

S. 44 will also make recovery for punitive damages more difficult. In Wisconsin, juries determine the amount of punitive damage. The court may order a new trial only if it feels the award is excessive. The Bill would give the court complete control over the amount of punitive damages to be awarded, although juries would still decide if such damages should be awarded.

Several sections of the Bill will benefit Wisconsin consumers. For example, if a manufacturer could not be reached for service of process or to enforce a judgment, the product seller would become liable.

In the area of comparative negligence, plaintiffs will benefit from the Bill. A plaintiff's award will be reduced in direct proportion to their own negligence. They could recover even if their own negligence exceeded that of the defendant. In Wisconsin, a plaintiff is not barred from recovery altogether if their own negligence exceeds that of the defendant.

The overall effect of the Bill on Wisconsin consumers, however, will be a negative one. The Bill would create even more legal barriers than now exist for consumers injured by unreasonably dangerous products.

Pre-emption of state product liability laws by federal statute will also stifle the potential for innovation and improvement in the field of product liability law.

Whereas common law doctrines can adapt to changing social and economic conditions, a federal statute would not be as responsive. It is curious that many proponents of the "new federalism" back this federalization of product liability law.

More importantly, the relaxed standards for product safety and procedural changes will reduce incentives for manufacturers to market safer products. Under present laws, accidents involving household products alone resulted in 20 million injuries and 110,000 disabilities yearly. At a time when manufacturers need to produce safer products, efforts this bill are grossly misguided.

STATEMENT OF AMERICAN TEXTILE MANUFACTURERS INSTITUTE

Mr. Chairman, we appreciate the opportunity to submit a statement for the printed record on product liability reform legislation.

As a trade association representing eighty-five percent of the textile industry, the American Textile Manufacturers Institute (ATMI) believes that our industry has been unfairly subjected to substantial variations in product liability law made by courts of some states. There is, in fact, such a conglomeration or results from case to case that there seems to be few controlling principles. States now have substantially different standards for product liability. For this reason, ATMI commends you, Mr. Chairman, for introducing legislation that will bring uniformity and certainty to product liability law. We believe enactment of product liability reform legislation will bring some stability to what has become a serious burden on interstate commerce and relieve manufacturers from excessive and unreasonable costs.

By stabilizing the major areas of product liability tort law, we believe it would benefit the economy by improving the ability of manufacturers to design more technologically innovative products and distribute them in a wider national and international market spectrum. Our principal problem, however, is that despite the existence of a national standard for flammability of apparel fabrics, this standard is not applied by courts for product liability purposes. For almost thirty years, for example, textile products in the United States designed for use in wearing apparel have been required to meet federal flammability standards established under the Federal Flammable Fabrics Act (15 U.S.C. §1191) ("FFA"). More recently, standards have been imposed on carpets and rugs, mattresses, and children's sleepwear. The industry has an almost perfect record in complying with those standards. Despite this record, textile manufacturers are constantly beset with lawsuits by claimants who have been injured in fires involving apparel fabrics. The fabrics meet the standards, but the manufacturers are unable to use the standards as a defense.

The reason for this remarkable phenomenon is that the courts have held that meeting the standards set under the FFA is only "some evidence of due care" and, absent clear and pre-empting language, is not conclusive as to the reasonableness of the manufacturer's conduct or to the existence of an unreasonably dangerous condition in the product itself. The rationale has been that the standards are too easily met and that they allow fabrics on the market which actually are "unreasonably dangerous."

The fallacy in the position taken by the courts and the critics of the standards is that they have never been able to propose an acceptable alternative standard. The State of California, for example, proposed to the Consumer Product Safety Commission ("CPSC") several years ago that it be allowed to adopt a State statute requiring all children's wear in California to meet the Children's Sleepwear Standard (FF 3-71 and FF 5-74), a more stringent standard than CS 191-53, the general wearing apparel standard. California criticized the general wearing apparel standard as too loose. Yet, when all the facts were in, it became obvious that the availability of children's wear in the State would become practically non-existent and that what was available would be extremely costly. California's proposition was denied. The truth is that treating fabrics for flame retardancy is a very tricky business—what works on one fiber will not work on another.

What is acceptable for a heavy-weight corduroy, for example, is not acceptable for a light-weight, like batiste. The chemicals wash out, cause skin rashes or, some allege other health concerns. In fact, since the CPSC's action banning fabrics treated with Tris (2,3 dibromopropyl phosphate), the industry has understandably shied away from trying new treatments. Until our federal government puts into effect some defined higher standard, and offers some assurance it will not pull the rug from under those who endeavor to meet or exceed it, there is no incentive for a manufacturer to add some undefined better flame retardant performance. The risk that the fabrics will not be accepted is too high. Moreover, unless the fabrics are rendered almost flame-proof, many of the accidents will still happen, and the plain-

tiff's "experts" will still declare that something could reasonably have been done to prevent the fire.

It is important to understand that these accidents usually occur under circumstances that are obviously the fault of someone other than the fabric manufacturer and that even significant improvements in flame retardance would not have prevented them. The following examples are recent cases experienced by one of our members: (1) A pre-school child is left in a house trailer in a dress. In an effort to reach the cookie jar on a high shelf, she climbs onto the gas range. Her foot accidentally turns on a burner which ignites the dress. (2) A camper seeking shelter from the wind builds a fire under an abandoned automobile. The gasoline in the tank explodes burning his chest and arms. (3) An elderly patient, under sedation, with cigarettes and matches sets fire to the bed sheets.

In each case, the fabrics in the clothing worn by the individuals met CS 191-53. Even if a higher standard had been applied, the accident would still have occurred. In each case, the company was able to settle the lawsuit. But, in each case, the settlements cost thousands of dollars and the expense of defense counsel, travel, depositions, productions of documents and related expenses cost many thousands more. In fact, it is not unusual for the costs of defense to far exceed the amount actually paid the claimant.

All the foregoing boils down to this. The single most important issue for many manufacturers in the products liability area is for the law to sanction those standards which they are constantly required to meet. For some, these are demonstrated by industry practice. For others, these are found in independent lab standards, such as Underwriter's Laboratories. For still others, there are federal laws which set the standards and agencies which enforce them. But, as the law now stands, rather than being able to rely on such standards, the manufacturer is subjected to a most unfair procedure in a products liability trial. The plaintiff's lawyer, in the presence of the scarred and suffering claimant and his weeping family, constructs for a lay jury an edifice of "expert" testimony and sets a heretofore unidentified standard demonstrating how the injury was the fault of the product manufacturer. This happens every day in product liability cases.

From the standpoint of the American Textile Manufacturers Institute:

1. The bill, first and foremost, should provide that at least where a federal safety standard governs some performance feature of a product, no liability may be found against the manufacturer of that product on any theory which would require a higher standard of performance. Such a provision could appear in Section 5.

2. The definition of "practical technological feasibility," which figures so prominently in Section 5, Product Design and Construction, should be based on a requirement of successful use. "Developed, available and capable of use" in someone's opinion is no substitute for practical experience. The section should read that the term means "... technical and scientific knowledge relating to the safety of a product which, at the time of manufacture of a product, was developed, available and actually in use, practically and economically, in the manufacture of a product."

3. The bill's concern with expert opinion at Section 4(b) is well placed. The requirement that the opinion be supported or corroborated by sound objective evidence, however, does very little to alleviate the real problem. In a flammable fabrics case, an "expert's" opinion that a fabric was an "unreasonably dangerous" material would be corroborated by the plaintiff's scars, the testimony of how the fire occurred and every other part of the plaintiff's case. The same would be true of most product cases. The real problem is the liberality of the courts in qualifying "experts." College professors, metallurgists, arm-chair engineers and others whose credentials sound impressive, but who never made or sold a product in their lives are allowed to tell juries, who also never made or sold the product in their lives, what the manufacturer should have done. Our suggestion is to restrict the testimony of experts to persons whose qualifications include expertise in the manufacture, design or marketing of specific product involved.

4. The provision in Section 4(c) for bringing suit against an entire industry where the manufacturer of the product cannot be identified by the plaintiff is incomplete and so cannot be commented upon. Must the jury identify which manufacturer it believes most likely made the product involved? May the jury assess the verdict against two or more, or all, of the defendants? On what basis?

5. Section 5(a) is worded too vaguely. Even though the drafters probably expect the requirement for proximate cause contained in 4(a)(3) to obviate the difficulty, we are disturbed by this section's provision that any deviation of a product from design or performance specifications, or from otherwise identical units, renders it "unreasonably dangerous." After all, section 4(a)(3) requires only that the unreasonably danger be "a cause," not "the cause," of the injury for liability to attach.

Suppose, for example, a fabric designed to be 65 percent polyester and 35 percent cotton is accidentally woven of yarns which produce a 70 percent polyester/30 percent cotton blend.

The igniting and burning characteristics of such a fabric would be almost identical to the 65 percent/35 percent style and easily within the FFA standards. Moreover, the same manufacture would probably also produce a 70 percent/30 percent blend under another style name. Yet, by definition, this product would be "reasonably dangerous," and the plaintiff, citing this statute, would be entitled to a jury charge to that effect. The section needs to be reworded to include a measure of danger beyond the mere deviation from design standards.

6. Section 11 deals with the effect of worker compensation benefits and should be left to each state. These state programs have been hammered out over the years by competing interests in each state. For a federal bill like this one to impact these delicately balanced interests will probably raise strong opposition from interests who are not concerned with the principal thrust of the bill. Particular exception is taken to Section 11(a) which would permit a jury to determine the amount of worker compensation benefits to which a claimant might be entitled in the future. The award of worker compensation benefits, including medical coverage, scheduled benefits as opposed to temporary total or permanent total disability benefits, etc. is a very complex business administered by specialized commissions in most states. It is simply beyond the province of any jury to make this complex determination of law and fact.

In conclusion, ATMI believes uniform federal legislation is necessary in order to alleviate the burdens imposed on consumers and manufacturers from state-to-state conflicting product liability laws. Therefore, a balanced and comprehensive approach in solving this national problem is the only available avenue which would effectively solve the problem once and for all.

STATEMENT OF THE MACHINERY AND ALLIED PRODUCTS INSTITUTE

Mr. Chairman and Members of the Committee, by a press release of March 30, 1983, Chairman Packwood of the full Senate Commerce Committee, announced Consumer Subcommittee hearings on April 6 and 27 on S. 44, a bill to establish uniform federal standards for products liability law. Members of the subcommittee staff have informed us that written comments on this subject will be accepted for inclusion in the printed record of those hearings. This statement is submitted in accordance with that understanding.

We appreciate the opportunity to comment on a subject of great importance to the Machinery and Allied Products Institute (MAPI). As the members of the subcommittee may know, MAPI is the national organization of capital goods and allied product manufacturers. The products of such companies—power generation equipment, construction equipment, rolling mills, machine tools, farm equipment, and components such as gears and bearings, to mention only a few—are those products frequently involved in workplace accidents which result in costly products liability claims.¹

The Institute's interest in the subject dates from 1960 when members of the MAPI Insurance Council first noted a significant increase in suits against machinery manufacturers by employers or their insurers to recover worker's compensation payments made as a result of workplace accidents. In the intervening two decades and more, MAPI has carried on a fairly extensive educational program in the field, including the publication of numerous bulletins, two full-length books, as well as holding a series of conferences on the subject. Our extensive coverage of the field is illustrated by the attached list of MAPI publications on products liability. Most recently, MAPI sponsored the production of a motion picture, "Events at Puntnam's Crossing," which is designed to motivate corporate employees to improve the quality and safety of the products they make.

It is from this background that we approach consideration of S. 44.

Earlier subcommittee hearings on a predecessor bill, S. 2631, concentrated upon a demonstration of a need for federal products liability legislation. We accept the existence of that need—indeed, we have long argued for federal legislation—but we

¹ As stated in the Executive Summary of the Commerce Department's Final Report of the Federal Interagency Task Force on Product Liability, "According to the recent Insurance Services Office Closed Claims Survey, workers injured on the job are involved in 11 percent of products liability accidents resulting in claims payments. However, these incidents account for 42 percent of total bodily injury payments." (Page I-13).

doubt if those who oppose S. 44 do so. Testimony offered by opponents of the bill on April 6 make that clear. Therefore, lest they be forgotten, we intend first to recapitulate very briefly the most important reasons which we believe require federal products liability law. thereafter, we intend: (1) to examine in some detail certain of the arguments repeatedly advanced by those who oppose this legislation; (2) to consider two major products liability issues that are not addressed by S. 44 but which, according to last year's committee report on S. 2631,² are considered to "... merit discussion and ... further study"; and (3) to offer certain specific suggestions for the amendment and improvement of S. 44.

THE NEED FOR FEDERAL LEGISLATION

From the establishment of the Union, the United States has been the quintessential "common market." The continental sweep of the American market is a principal reason for our national prosperity and to prevent the adoption of local restrictions which might "bulkanize" that market, the Constitution has reserved to the federal government the power to regulate interstate commerce.

We have recited these self-evident propositions because they lie at the heart of the controversy over establishment of federal products liability law. Most American manufacturers sell their products in many, if not all, of the states of the Union. Although the market for the product is national, products liability law is local. Identical products sold in 50 states are subject to 50 different rules of law in this area. And, as if this were not enough of a game of chance, the resourcefulness of counsel and the continually evolving wisdom of the courts have resulted in 50 different rules of law that are subject to change without notice.

All this has caused an immense, and still growing, burden of cost on industry and, ultimately, on those who consume the products of industry. We believe those costs—and the handicap they represent for manufacturers who are said to no longer be competitive worldwide—will continue to mount until some reasonable uniformity in products liability law is achieved by federal legislation.

Finally, there is the chilling effect of the present state of products liability law on industrial innovation. Useful products have died stillborn because of this effect. Moreover, evolutionary—and necessary—product improvements are sometimes abandoned because such improvements—given the present state of products liability law—might be used as evidence that the product being improved was unsafe. (Although we have no doubt whatever of the truth of the statements just made concerning the inhibition of innovation by products liability, we must acknowledge that it is a subject of great sensitivity. Beyond that, there is also the logical difficulty of proving a negative.)

For all these reasons, products liability is a very serious national problem. It will only yield to a national solution.

SOME OPPOSITION ARGUMENTS

We do not intend to address all of the arguments advanced by those who oppose S. 44 or any other form of federal products liability legislation. However, we believe that some of those arguments are strawmen and, as such, invite demolition. Let us consider a few.

The development of the "common law"

Opponents of this proposed legislation argue that enactment of S. 44 would interrupt the development of tort law by cutting off the centuries-long evolution of legal principles following the rule of stare decisis. We believe that there are at least three things wrong with this argument.

First, we are not talking about tort law, but about a subbranch of torts—products liability. The vast body of tort law would continue its evolutionary development within the several jurisdictions of the United States if S. 44 were enacted. Secondly, the bill, in Section 5, adopts the concept of "a reasonably prudent manufacturer in the same or similar circumstances." Such a person in 1990 will not be the same as such a person in 1980. Thus, the law is not frozen but, by its own terms, provides sufficient flexibility for future growth and development.

As for the third point, let us remember that products liability is almost wholly judge-made with an assist from legal scholars who wrote the Restatement (Second) of Torts. To be sure, there have been some statutes enacted at the state level—large-

² Senate Report No. 97-670, Products Liability Act, Report of the Senate Committee on Commerce, Science and Transportation.

ly ineffectual and totally lacking in uniformity. Consider also that the courts arrived at strict liability in tort on the theory that the manufacturer should be liable for injury attributed to his products because he is the one best situated to distribute the cost of the injury and, of course, because he has a "deep pocket."

As Victor Schwartz, one of this country's foremost authorities on tort law, said in his testimony on April 6,³ "the 'deep pocket' approach to product liability suggests that compensation is always the goal where a person is injured by a product. This is inconsistent with traditional tort law that liability should be imposed only where responsibility for the harm can be proven. If compensation is the goal, it is inappropriate to distort tort law principles for the purpose." Thus, it appears that the law of products liability, left to development by the state courts, has brought itself into direct conflict with a bedrock principle of tort law. A judicial process which produces such a result needs to be legislatively examined. Nor is this the whole of it.

The "innocent manufacturer and the innocent consumer"

An increasingly popular argument of S. 44 opponents goes something like this: "If I am made to choose between an innocent manufacturer whose product injured an innocent consumer, I will vote for the consumer." It is said that "hard cases make bad law," and this is a hard case which has resulted in bad law. In some formulations, the argument assumes that injury to the consumer resulted from some aspect of the product that was unknown—and unknowable—at the time of manufacture.

Let us repeat and extend what Victor Schwartz had to say to the subcommittee on April 6.⁴ "If compensation is the goal," said Mr. Schwartz, "it is inappropriate to distort tort law principles for that purpose. *The mechanism for achieving it is outside the tort litigation system where damages can be strictly limited and the role of lawyers and judges is almost totally eliminated.*" (supplied.) Precisely. If the law of products liability is to become a system for automatically compensating those who are injured in products liability incidents—and strict liability seems headed in that direction—such a social policy decision should properly be legislative rather than judicial. To repeat ourselves, products liability law today is largely, almost wholly, judge-made. The state of the law demands legislative review and it must be a federal review. And we believe the conclusion applies with special force where the injury-producing aspect of the product was "unknown and unknowable" at the time of manufacture.

The uncertainty argument

This argument is to the effect that it will take years for federal and state courts to define new concepts and terms embodied in S. 44 and that, in doing so, the courts will look to state law. The result, so the argument goes, will be a state of confusion as great or greater than now exists.

There is something to this argument, but not much. The measure before us, S. 44, goes to great lengths to define its terms and concepts. Insofar as definitions of unfamiliar terms are needed, the legislative history of this measure should provide them. If this is done, the legislative history of the Act and not state law will provide a guide for judicial interpretation. Moreover, it is very hard to believe that the present state of confusion involving 50 different bodies of applicable law could not be improved by a uniform federal statutory rule.

The position of the American Bar Association

In its meeting in February 1983, the House of Delegates of the American Bar Association adopted a resolution opposing "broad federal legislation" on products liability, but, in the same vote, expressed support for federal legislation to address the issues of liability and damages in the area of occupational disease claims, such as asbestosis, and federal legislation "allocating products liability risks between the federal government and its contractors." One wonders why the opponents of S. 44, at least among members of the House of Delegates, are so concerned about choking off the development of tort law by enactment of federal products liability legislation but actively support such legislation in the cases just cited.

If there are sound reasons for the enactment of federal legislation in the two situations approved by the American Bar Association's House of Delegates, there are equally sound reasons for federal products liability legislation. The House of Delegates' action is internally inconsistent.

³ P. 13 of Victor Schwartz' written statement.

⁴ *Op. cit.*

OTHER PRODUCTS LIABILITY ISSUES

Our comments on certain of those issues which last year's Committee Report felt merited more study appear below:

Compliance with government contract specifications

We believe a manufacturer should have an absolute defense where the injury-causing aspect of his product conformed to government specifications. Such a defense was included in an earlier version of S. 2631. The Committee Report indicates that this provision was dropped because of testimony in last year's hearings to the effect that "... any defense for compliance with government specifications might inappropriately insulate manufacturers from liability in instances where they did, in fact, take part in product design and development."

Even where a contractor may "take part" in product design and development, the government controls the process throughout. For example, the government may insist on trade-offs which affect the product's safety but in which decision the contractor had no voice.

We urge that the government contract specification defense be reinstated in S. 44 as an absolute defense subject to one exception. The defense would not apply where the product being purchased is a commercial item.

Compliance with government safety standards

Last year's Committee report attributed the dropping of compliance with government safety standards as a presumptive defense to the fact that "... government standards are often intended to be minimum standards and, in addition, sometimes fail to keep abreast of industry developments." The Committee report goes on to say, "Opponents of the defense also believe that government standards already receive substantial weight from juries when that weight is warranted."

If it is a fact that there are substantial qualitative differences among government safety standards, this should not make it impossible, or even difficult, to reinstate such a defense. We urge the inclusion in S. 44 of a provision under which proof of compliance in the design and/or manufacture of a product with a suggested or exemplary federal, state, or local standard would raise a presumption that the product is not unreasonably dangerous. The presumption could be rebutted if the claimant offers clear and convincing evidence that (1) the product was unreasonably unsafe, and (2) a safer design was technologically and economically feasible and would have complied with all mandatory government safety standards.

Such a provision should also provide that proof of compliance with a mandatory government standard, such as those issued by the Food and Drug Administration and the National Highway Traffic Safety Administration, would establish a conclusive presumption that the product was not unreasonably dangerous.

FURTHER SUGGESTIONS

We have two additional suggestions for revision of S. 44.

Time limitation on liability

This section of the proposal provides for a 25-year "statute of repose" for capital goods only and only as to defects in design or failures to warn or instruct but not as defects in manufacture.

It seems to us that this period of time is unduly long, even for capital goods only. A more reasonable period would be 15, or, at the most, 20 years. Secondly, we believe the statute should apply to all products and, thirdly, it should protect the manufacturer or seller from all kinds of products liability claims.

Punitive damages

We believe S. 44 should be amended to establish the following two limitations on punitive damages: (1) a limitation on the amount of punitive damages that may be awarded in a single action, and (2) the amount that may be awarded in multiple actions. The applicable present provision of S. 44 would require the court to consider the total effect of other punishment imposed but there is no limit on such punishment.

We recommend limiting punitive damages for a single injury to two times actual damages with a limit of \$1 million. We recommend further that, in the case of multiple accidents involving the same product, there should be a limit equal to the lesser of \$5 million or 5 percent of the manufacturer's net worth. Such a limitation should carry the proviso that when this latter limit is reached, a claimant could still

collect the lesser of (1) litigation expenses, or (2) two times actual damages subject to a maximum of \$1 million.

This concludes our statement on S. 44, the Product Liability Act. If the Institute can be of any assistance to the subcommittee or its staff, please call on us.

STATEMENT OF THE NATIONAL MASS RETAILING INSTITUTE

The National Mass Retailing Institute ("NMRI") is pleased to provide the Senate Committee on Commerce, Science and Transportation with comments in support of S. 44, the Product Liability Act.

NMRI is a trade association representing the discount merchandising industry, with 10,000 retail stores and over \$60 billion in annual sales. Discount retailers depend on high volume, low-margin sales and promote efficiency in the chain of distribution of goods. As such, they are uniquely qualified to comment on a legislative proposal that would foster greater efficiencies in the legal system without compromising the rights of product users or consumers.

The problems associated with the current system of product liability tort law, which is based primarily on the case law developed by individual state courts, are serious. The current case by case approach has in effect created fifty different product liability legal systems—with differing rules in each state. Thus the same fact situation may lead to different litigated results—depending on the state in which a suit is brought. Whatever the sufficiency of this system in earlier times, convincingly it bears little relation to the realities of today's national marketplace for goods.

As a member of the Product Liability Alliance, NMRI wishes to associate itself with the testimony in support of federal uniform product liability legislation provided to this Committee by that group. Accordingly, in these comments, NMRI wishes to focus on the importance and critical need for Section 8 of S. 44, which delineates the responsibility of product sellers under the uniform law established by the bill.

Under the product liability laws currently in effect in several states, retailers are treated in the same manner as manufacturers—even though they generally have no responsibility for the design or manufacture of the products they sell. As a result, persons injured by a defective product often sue all parties in the chain of distribution, including retailers. The cost to retailers in defending such suits is expensive and time-consuming—even though retailers rarely wind up paying the judgment because they are, in fact, not responsible. These costs and inefficiencies, are ultimately passed on to the consumer.

Section 8 recognizes the unfairness of the current system by limiting the circumstances in which a product seller may be liable for a person's product-related injury. Indeed, Section 8 limits product seller liability in a product liability suit to three situations. First, if the harm was caused by the seller's own negligence, the seller is responsible. Second, if the harm was caused by the seller's breach of its own warranty, the seller is responsible. Third, if the manufacturer which actually caused the harm is not subject to service of process or, in the court's view, could not pay a judgment, the product seller will be treated as if it were the manufacturer. In the third instance, the bill assures that injury caused by an unsafe product will be compensated, although not by the truly responsible party. NMRI opposes this latter provision on the grounds that it is not in accord with the basic principles of tort law that a person should only be liable for harm for which he is at fault. However, as a practical matter, NMRI recognizes that S. 44 represents a balanced approach to a complex problem that must also accommodate the interests of those who are injured by products that are, in fact, defective.

NMRI believes that Section 8 in particular provides an important advance over the current haphazard system of product liability law and will reduce costs to both retailers and consumers, without compromising the rights of product users. On balance S. 44 is a progressive and constructive piece of legislation and NMRI strongly urges its adoption.

STATEMENT OF PUBLIC CITIZEN'S CONGRESS WATCH

INTRODUCTION

This memorandum explains 33 different ways in which S. 44, the Kasten product liability bill, limits the liability of all American and foreign businesses that make or sell defective products in the United States.

The bill's most significant limitations on liability would largely overrule three of the most important concepts in modern product liability law: strict liability, joint and several liability, and liability for foreseeable but unintended uses.

Specifically, the Kasten bill would:

Retain strict liability only for manufacturers of products containing construction defects (pp. 3-5);

Replace strict liability of non-manufacturers for construction defects with a traditional negligence standard (pp. 26-29);

Replace strict liability of all defendants regarding design defects and failures to warn with a standard closer to actual knowledge than traditional negligence (pp. 6-10);

Eliminate the near-universal rule of joint and several liability and instead make defendants severally liable only (pp. 29-31); and

Eliminate the well-established rule that today holds a manufacturer liable for injuries caused by foreseeable uses of its product, and substitute a rule that approaches holding the manufacturer liable only when its products are used the way it intended them to be used (pp. 31-36).

The rules the Kasten bill adopts were at one time the law. Prior to 1963, for example, when *Greenman v. Yuba Power Products* was decided and Section 402A of the Restatement (Second) of Torts was being drafted, negligence—although not the onerous negligence standard adopted by the Kasten bill—was the law. Prior to 1900, joint and several liability was not well-established. And before 1968, when the landmark *Larsen v. General Motors* case was decided, manufacturers often were not liable for the consequences of foreseeable misuse.

Today, however, strict liability, joint and several liability, and liability for all foreseeable uses are well-established. The Kasten bill proposes to overrule them.

Other well-established rules would also be overruled by the Kasten bill. Section 13, for example, severely restricts the availability of punitive damages; members of the Reagan Administration have suggested that this provision might be unconstitutional. Section 14 prohibits the plaintiff from introducing evidence of subsequent remedial measures to prove any issue in a product liability case; the federal rules of evidence, in contrast, allow such evidence to be admitted on issues other than liability. Section 4(c) requires the plaintiff to relitigate issues that already have been fully litigated, despite the Supreme Court's 1979 *Parklane* decision allowing courts to rule that an issue already decided in one case need not be relitigated in another case.

Finally, Section 12 of the Kasten bill would prohibit suits by people injured by defectively designed capital goods more than 25 years old despite the fact that four state courts have held similar provisions unconstitutional.

Two fundamental policies underlie modern American product liability law: (1) it is fairer to require one who makes a defective product and profits from it to compensate an innocent person injured by that product than to allow the injured person to go without compensation; and (2) placing the cost of an injury caused by a defective product on those who profit from its sale encourages manufacturers and sellers to ensure that their products are safe. The Kasten bill would severely undercut both these policies. Most troubling, it would limit the liability of manufacturers without providing any alternative compensation mechanism, thereby shifting costs to Medicaid, Social Security and other government programs, and raising the cost of accidents to society (while reducing the cost to the manufacturer).¹

What follows is a provision-by-provision analysis of 33 of the ways in which the Kasten bill alters present law by limiting liability.

PROVISION-BY-PROVISION ANALYSIS

A. Section 5—Elimination of strict liability for design defects

A product may be defective either because someone on the assembly line made a mistake or because the company designed it badly. The first kind of defect is called a manufacturing or construction defect. For example, any car that is not built according to specifications (e.g., a car with a cracked axle) or a drug which is not produced according to its formula (e.g., aspirin containing arsenic) contains a manufac-

¹ The proponents of S. 44 argue that the Kasten bill would reduce excessive insurance costs that have driven up the price of products. In fact, however, the Interagency Task Force on product liability found that in all but three industries product liability insurance costs never have exceeded one per cent of gross sales. Interagency Task Force on Product Liability: Final Report, U.S. Dept. of Commerce, Washington, D.C., in Frumer & Friedman, *Product Liability*, App. G, at App-974 (1977) (hereinafter "Schwartz Task Force.") Moreover, in 1981 *Business Insurance* magazine reported that "Product liability insurance premiums have leveled off or plunged during the last three years." *Business Insurance*, July 27, 1981, at 20.

turing or construction defect. If the specification or formula itself is bad, on the other hand—e.g., a gas tank that explodes because it was designed without an extra \$8 lining, or a drug that relieves nausea but causes cancer—the product contains a design defect.

Today, in both construction defect and design defect cases, strict liability prevails in most states: the victim must prove that the product that injured him was defective, but need not prove the manufacturer's negligence.² The focus is not on the conduct of the manufacturer but the defective condition of the product. See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); Restatement (Second) of Torts, § 402a.³

Section 5 of the Kasten bill would retain strict liability for construction cases, but eliminate it for design defect cases. And virtually all the cases involving the most serious injuries caused by products—drugs and medical devices, asbestos and other occupational diseases, hazardous and chemical wastes, auto defects, etc.—are design defect cases.

Section 5 is enormously harmful to victims both (1) because it substitutes a negligence standard for a strict liability standard in design defect cases, and (2) because the particular negligence standard it adopts is significantly more difficult for the victim to meet than the traditional negligence standard.

1. Requiring the Victim To Prove the Manufacturer's Negligence

This is what the proponents of the bill really want, and what opponents find totally unacceptable for two fundamental reasons.

First, in some cases the manufacturer may not have been negligent but the product it made was nevertheless defective. In such cases current law holds the manufacturer liable, reasoning that it is more fair to require one who makes a defective product and profits from it to compensate an innocent person injured by that product than to allow the injured person to go without compensation.

Second, even where negligence is present, the plaintiff often cannot prove it since defendants typically have control over the evidence bearing on their knowledge and their conduct. Defendants also have the resources and the ability to delay—sometimes indefinitely—so that the plaintiff cannot afford to proceed and gives up or settles for far less than the damages suffered. Under our legal system, defendants certainly have a right to pursue such a strategy; but by requiring the plaintiff to prove negligence, the Kasten bill makes it far more likely that such a strategy will succeed.

2. Requiring the Victim To Prove More Than the Manufacturer's Negligence

While requiring the plaintiff to prove simple negligence would by itself make it more difficult for the plaintiff to prevail, the Kasten bill requires the plaintiff to prove much more than simple negligence, in the following ways:

a. *Section 5(b) requires a manufacturer to conform its conduct to that of a "reasonably prudent manufacturer" rather than of a "reasonably prudent person."*—As Professor James Jeans recently testified before the Senate Consumer Subcommittee, the "reasonably prudent manufacturer" standard may allow manufacturers to escape liability by showing that others in the industry also made defective products in the same way.⁴ Under this standard, asked Professor Jeans, "If defendant adduces proof from all the competing manufacturers that they follow the same practice, does this not foreclose further consideration? Will there be a 'conspiracy of silence' within the ranks of the manufacturers?" cf. *Marsh Wood Products v. Babcock & Wilcox*, 240 N.W. 392 (Wis. 1932) ("manufacturers cannot, by concurring in a careless or dangerous method of manufacture, establish their own standard of care.")⁵

² Different states define "defect" in slightly different ways, but in virtually all states the victim is not required to prove that the manufacturer was negligent—he is required to prove that the injury was caused by a defect in the product.

³ For the citation to the case that first adopted strict liability in each state, see Comment: Products Liability, 17 Gonz. L. Rev. 357, 365 n.37.

⁴ Testimony of James Jeans, Professor of Law, University of Missouri/Kansas City, before the Consumer Subcommittee, Senate Commerce Committee, Apr. 27, 1983.

⁵ The drafters of the report to S. 2631, apparently realizing that the plain meaning of the "reasonably prudent manufacturer" standard is to make the industry standard controlling, observe that "[t]he law of torts is therefore clear that reasonably prudent conduct is not merely what everybody in a particular industry does, but rather what is prudent conduct under the circumstances." Report of the Senate Committee on Commerce, Science and Transportation on S. 2631, 97th Cong., 2d sess., No. 97-670 (Dec. 1, 1982). If the drafters of the Kasten bill truly

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b. Section 5b allows the adequacy of a manufacturer's conduct to be judged "at the earlier of the time of manufacture of Government certification of the product."—This standard could absolve a manufacturer from liability even if it actually knew its product was dangerous, as long as reasonably accepted scientific knowledge of the product's danger did not exist when the government certified the product. This "government certification" defense would have its most significant liability-limiting affect in plane crash cases. Professor Jeans cites the example of an airplane which, although thought to be safe when certified by the Federal Aviation Administration, crashes due to wind shear. Under current law, if another unit of the same model later crashes due to wind shear the manufacturer would probably be liable, since a reasonable manufacturer probably would not continue to market a plane that could not withstand wind shear. Under the Kasten bill, even though the manufacturer was fully aware at the time it was sold that the plane was dangerous, it would escape liability since reasonably accepted scientific knowledge of the danger did not exist when the plane was certified by the FAA. According to an internal Commerce Department memo, the "government certification" defense was put in the bill at the request of the aircraft industry.⁶

c. Section 5(b)(1) requires the victim to prove that the manufacturer should have known about the danger that caused the injury, "based on knowledge which was reasonably accepted in the scientific, technical or medical community for the existence of the danger which caused the claimant's harm."—Professor Jeans suggested that the "reasonably accepted" requirement could encourage manufacturers to ignore minority view studies concluding that their products are dangerous—no matter how catastrophic the results—until a consensus develops. Jeans cites the example of a manufacturer continuing to market its baby formula despite a scientific study concluding that the formula causes crib death, because the company's own medical research staff disputes that study. The Kasten bill would likely absolve the manufacturer because the crib death study was not "reasonably accepted" in the medical community.

The "reasonably accepted" requirement could also have prevented recovery in *Bichler v. Eli Lilly*, 55 N.Y.2d 571 (1982). Joyce Bichler contracted cervical and vaginal cancer and had all her internal reproductive organs and two-thirds of her vagina removed when she was 17 because her mother was given DES during pregnancy in 1953. Lilly defended on the grounds that in 1953 "cancer to the offspring was [not] a foreseeable risk of prenatal DES exposure." 55 N.Y.2d at 586. But Lilly had failed to test DES on pregnant mice before marketing it, despite scientific studies published before 1953 indicating that DES was neither safe nor effective. The court upheld the jury's finding that if Lilly had exercised reasonable care it would have tested DES on pregnant mice, learned from such tests that DES could cause cancer in female offspring, and not have marketed the drug.

Under the language of the Kasten bill, however, Eli Lilly would have a good defense. Because as of 1953 neither Eli Lilly nor any other drug company had tested DES on pregnant mice to determine whether it caused cancer in female offspring, no evidence then existed that "was reasonably accepted in the scientific, technical or medical community for the existence of the danger which caused the claimant's harm."

Thus, section 5(b)(1) prevents recovery on a failure to test theory—the theory on which Joyce Bichler won her case—since there is no liability unless there is reasonably accepted knowledge of the danger causing the harm, and there can be no reasonably accepted knowledge of the danger causing the harm unless that danger is tested for. Therefore, instead of serving as an incentive for manufacturers to discover product dangers at an early stage, section 5(b)(1) of the Kasten bill actually discourages any conduct which might evidence consensus that a profitable product is dangerous and should be taken off the market. Cf. *Beshada v. Johns-Manville*, 447 A.2d 539, 548 (N.J. 1982).

d. Section 5(b)(2) requires the victim to prove that a means to eliminate the danger causing the harm was within "practical technological feasibility."—Section 2(8) defines "practical technological feasibility" as knowledge which was "developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer." This definition allows the manufacturer to put a highly dangerous, relatively useless produce on the market even though it knows that the technology to eliminate the danger will soon be available.

wanted to make clear that reasonably prudent conduct is not what everybody in a particular industry does, however, they would explicitly require a manufacturer to conform its conduct to that of a reasonably prudent person rather than that of a reasonably prudent manufacturer.

⁶ The memo was not reproducible and is in the committee files.

3. The "Unavoidably Dangerous" Escape Hatch

Section 5(c) of the Kasten bill absolves the manufacturer from liability on the grounds that an "unavoidably dangerous aspect" of a product caused the injury. Section 5(c) defines an "unavoidably dangerous aspect" as one that could not have been eliminated without impairing either the product's effectiveness or its "desirability, economic or otherwise . . . to the person who uses or consumes it."

This definition would immunize a manufacturer when its product cannot be made safe, even if the utility of such product is marginal or virtually nil. Under present law, on the other hand, manufacturers are not liable for injuries caused by dangerous products whose utility nevertheless outweighs their danger. They are liable, however, if the product's danger outweighs its utility. As the Interagency Task Force on Product Liability, headed by Victor Schwartz, acknowledged in 1977, "to determine whether a product is defectively designed, the risks presented by the product must be weighed against its utility."⁷ For example, there is a substantial risk that rabies victims will suffer adverse side effects when given the rabies vaccine. The vaccine's utility, however, is clearly greater than its risk—if rabies victims are not given the vaccine they die. The manufacturer of the rabies vaccine is therefore not liable under either present law or the Kasten bill.

On the other hand, if feminine deodorant spray could be manufactured only with a chemical that caused cancer, the manufacturer would be liable under current law because the utility of the product is far outweighed by its risk. The manufacturer would not be liable, however, under the Kasten bill, because cancer-causing feminine deodorant spray would be "unavoidably dangerous" even though its danger far outweighs its utility.

The "unavoidably dangerous" section could provide an escape hatch for many manufacturers. Makers of thalidomide, for example, could defend on the grounds that they could not eliminate the aspect of thalidomide that caused birth defects without also impairing its effectiveness for its intended purpose, i.e., preventing nausea in pregnant women. Similarly, the makers of asbestos could defend on the grounds that they could not eliminate the aspect of asbestos that causes cancer without also impairing its effectiveness as insulation, and the makers of cars with dangerous heavily promoted designs (e.g., the fins in cars of the late 1950s) could escape liability on the grounds that to eliminate the fins would impair "the desirability, economic and otherwise," of their cars to the victim.

4. The "Patent Danger" Escape Hatch

Section 5(d) of the Kasten bill absolves the manufacturer if the defect causing the injury was obvious: i.e., if it "was an inherent characteristic of the product" and "would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community."

This doctrine, known as the "patent danger" rule, was the law in 1950. The leading case was *Campo v. Scofield*, 301 N.Y. 468 (1950), in which the New York Court of Appeals held that the manufacturer had a duty only to avoid producing products with hidden defects or concealed dangers, and was not liable for injuries caused by obvious or "patent" dangers. The patent danger rule, however, rapidly fell into disrepute, and is now thoroughly discredited.⁸ As the Schwartz Task Force concluded in 1977, "The majority view is now that the open and obvious nature of the danger is only one factor to be considered in conducting the balancing test of defectiveness."⁹

The courts moved away from the patent danger rule because it discouraged safety. As the Florida Supreme Court noted in rejecting the rule in *Auburn Machine Works Co. v. Jones*, 366 So.2d 1167, 1170-71 (Fla. 1979):

"The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards."

⁷ Schwartz Task Force at App.-689 (1977). Victor Schwartz, who chaired the Task Force, now represents the Product Liability Alliance, a business coalition that strongly supports the Kasten bill.

⁸ See, e.g., *Micallef v. Miehle Co.*, 39 N.Y.2d 376 (1976) (overruling *Campo v. Scofield*); J. Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 Ind. L.Rev. 797 (1982); J. Liebman and R. Sandy, *Can the Open and Obvious Danger Rule Co-exist with Strict Tort Product Liability?* 20 Am. Bus. L.J. 299 (1982) (hereinafter "Liebman & Sandy").

⁹ Schwartz Task Force at App.-691.

Section 5(d) therefore would prevent a court from deciding that a product was so dangerous it should never have been marketed.

In addition, two respected law professors recently concluded that:

"A provision such as the open and obvious danger rule which circumscribes liability without providing an alternative compensation mechanism having adequate built-in safety incentives will have the effect of shifting costs to nonself-regulating compensation systems, such as Medicaid, Social Security, etc., thus raising the aggregate cost of accidents."¹⁰

Like the Kasten bill as a whole, section 5(d) circumscribes liability without providing an alternative compensation mechanism, thus shifting costs to Medicaid, Social Security and other government programs, and raising the cost of accidents to society (while reducing the cost to the manufacturer).

5. Bars to Introducing Evidence of an Alternative Safer Design

To prove that a design is defective under the Kasten bill the plaintiff must prove that a safety design for the product existed when the defendant made the product.¹¹ But section 5(e) of the bill prohibits the court from even admitting an alternative design as evidence unless the victim can prove the following:

a. *That the manufacturer should have known about the design based on knowledge which was "reasonably accepted" in the scientific community for the existence of the alternative design (sections 5(e)(1), 5(e)(2)(A)).*—These sections are subject to the same defect as section 5(b)(1)—they would prohibit the victim from introducing evidence of a design a significant minority of scientists concluded was safer (and that in fact turned out to be safer), unless the victim could also prove that the safer design was "reasonably accepted" in the scientific community when the defendant made the product. See discussion at pp. 8-9, *supra*.

b. *That the design was within "practical technological feasibility" (section 5(e)(2)(A)).*—This requirement would prohibit the victim from introducing evidence of safer designs that were possible but not within "practical technological feasibility." See discussion at p. 10, *supra*.

c. *That the hazards the alternative design eliminates are greater than "any new hazards it creates for any persons and for any uses" (§ 5(e)(2)(B)).*—Throughout the Kasten bill, the manufacturer has a duty to make his product safe only for persons who are "reasonably prudent product users" (e.g., Section 6(b)(4)) and only for uses that are "consistent with reasonable practice of users of the product" (section 10(a)(2)). In contrast, under section 5(e)(2)(B), a victim must prove that the design is better for any persons and any uses merely to get an alternative design admitted into evidence.

A suggested design alternative might eliminate one very significant hazard of a serious nature, but increase the probability of several lesser hazards. The trade-offs will still clearly dictate in favor of the design change but may not meet the statutory standard.

d. *That the safer design would have been "desirable, functionally, economically, and otherwise, to the person who uses or consumes it" (section 5(e)(2)(C)).*—This requirement would prohibit the victim from introducing evidence of a safer design unless he could prove that it would have been desirable in all ways to him. Terms such as "desirable" and "and otherwise" open the door for manufacturers to raise a hopelessly broad range of features related to consumer preference but wholly unrelated to the design defect at issue. As to every such feature argued by the manufacturer as "otherwise desirable," the plaintiff would bear the burden of proof.

6. Conclusion

In sum, the alternative design provision is a travesty—the alternative design is not even admitted into evidence unless the plaintiff can meet the burdensome tests set out above. When the alternative design section is combined with (1) the "reasonably prudent manufacturer" standard, (2) the requirement that knowledge of the danger be "reasonably accepted" in the scientific community, (3) the requirement that a means to eliminate the danger be within "practical technological feasibility" and the provisions that absolve manufacturers from liability for injuries caused by products that are (4) unavoidably or (5) obviously dangerous, it becomes clear that the Kasten bill would as a practical matter require the plaintiff to prove something

¹⁰ Liebman & Sandy, *supra* note p. 12, at 360.

¹¹ Unlike current law, the Kasten bill ensures that a manufacturer can never be liable for placing a dangerous product for which there is no safer alternative on the market, regardless of how useless that product is. See discussion at p. 10, *supra*.

closer to actual knowledge than to traditional negligence. Requiring proof of simple negligence would turn the clock back prior to 1963; requiring the plaintiff to meet the multiple proof hurdles in Section 5 would leave design defect victims in an even worse position, and would discourage people injured by defective products from bringing meritorious cases.

B. Section 6—Elimination of strict liability for failure to warn

"Failure to warn" cases are in effect a subset of design defect cases: the failure to warn about the dangerous nature of the product is what makes the product defective. In failure to warn cases, as in design cases, the plaintiff under current law need not prove the manufacturer's negligence. As the Schwartz Task Force acknowledged in 1977:

"Courts commonly require no additional showing, either of fault on the part of the manufacturer or of a defect in the product, in order to allow a plaintiff to recover for injuries which occurred because of the absence of a proper warning."¹²

The court in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 902 (Pa. 1975), reached a similar conclusion:

"It must be emphasized that the test of the necessity of warnings or instructions is not to be governed by the reasonable man standard. In the strict liability context, we reject standards based upon what the 'reasonable' consumer could be expected to know, or what the 'reasonable' manufacturer could be expected to 'foresee' about consumers who use his product. . . . Rather, the sole question here is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe."

The failure to warn section of the Kasten bill is in many ways identical to the design defect section: It eliminates strict liability and it requires the plaintiff to prove considerably more than simple negligence. In addition, it significantly expands the defendant's affirmative defenses and thus absolves the defendant even where the plaintiff can prove the manufacturer's knowledge.

1. Requiring the Victim To Prove Negligence

As in design defect cases, the requirement that the victim prove negligence in failure to warn cases is important for two reasons. First, the manufacturer may not have been negligent in failing to warn, but the absence of an adequate warning may still have created an unreasonable risk of harm to the public; and second, even where negligence is present the plaintiff often cannot prove it.

Beshada v. Johns-Manville, 447 A.2d 539 (N.J. 1982), illustrates both these reasons. In *Beshada*, dozens of asbestos victims, and the survivors of victims, sued the asbestos companies on the ground that prior to the 1960s they had failed to warn that asbestos was dangerous. The asbestos companies defended on the ground that "no one knew or could have known that asbestos was dangerous" prior to the 1960.¹³

The court held that even if the asbestos companies could not have known about the dangers of asbestos before the 1960s, they were still liable for failing to warn. The court explained that "by imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research." 447 A.2d at 548.

However, the court was clearly skeptical of the asbestos companies' claim that "no one knew or could have known" about the dangers of asbestos before the 1960s. The court observed, for example, that a federal court in Texas which had heard several asbestos cases had concluded that the industry knew asbestos was dangerous in the mid-1930s. The *Beshada* court also doubted whether it is possible to determine what "could have been known" at a given time.

The *Beshada* court thus apparently believed, as the Texas court held, that the asbestos industry could have known—and probably did know—that asbestos was dangerous prior to the 1960s. But to require the victim to prove what the industry could have known, the court emphasized, "will inevitably be complicated, costly, confusing and time consuming. Each side will have to produce experts in the history of science and technology to speculate as to what knowledge was feasible in given year."¹⁴

¹² Schwartz Task Force at App.-694.

¹³ 447 A.2d at 542. The plaintiffs in *Beshada* were workers suffering from, and the survivors of workers who had died of, mesothelioma (cancer of the lining of the chest or abdomen) and asbestosis (scarring of the lungs). The first symptoms of asbestosis and mesothelioma are not discernible until up to 40 years after the victim was first exposed to asbestos. Thus, if the court absolved the asbestos industry for any injury caused by exposure to asbestos prior to the 1960s, plaintiffs could not recover.

¹⁴ 447 A.2d at 548.

The court therefore held that the asbestos defendants should be liable for failing to warn even if they could not have known of the danger: First, because imposing strict liability would encourage manufacturers to do research to ensure that their products are safe, and second, because requiring the victim to prove scientific knowability would delay and could prevent recovery in cases where the manufacturer actually knew of the danger. Section 6 of the Kasten bill would overrule *Beshada*, and would thereby, in the words of Department of Labor attorneys, "cause major changes in ongoing asbestos litigation."¹⁵

2. Requiring the Victim To Prove More Than Negligence

The failure to warn section in the Kasten bill, like the design defect section, goes far beyond the traditional negligence standard by putting the plaintiff through a stringent, multi-step proof. For example:

a. Like section 5(b)(1) in design cases, section 6(b)(1) requires the victim to prove the manufacturer should have known about the danger that caused the injury and about which he failed to warn "based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm."—(See discussion at p. 8-9, *supra*).

B. Like section 5(b), section 6(b)(2) requires a manufacturer to conform his conduct only to that of a "reasonably prudent manufacturer" rather than of a "reasonably prudent person."—(See discussion at p. 6, *supra*.)

3. Section 6(d)(1)—The "Warning to a Third Party" Escape Hatch

Under current law, whether a manufacturer satisfies his duty to warn the product user by warning a third party depends on the likelihood that harm will occur if the third party does not pass on the warning to the ultimate user, the magnitude of the probable harm, the likelihood that the third party will pass on the warning and the burden on the manufacturer of warning the ultimate user. *Shell Oil Co. v. Gutierrez*, 581 P.2d 271, 278 (Ariz. App. 1978). See also *Seibel v. Symons Corp.*, 221 N.W.2d 50 (N.D. 1974); *Russell v. GAF Corp.*, 422 A.2d 989 (D.C. 1980). More generally, the magnitude of the risk involved must be compared with the burden which would be imposed by requiring the warning. Restatement (Second) of Torts, § 388, comment n.

In contrast, the Kasten bill considers only one-half of this equation—the burden on the manufacturer. The risk to the ultimate user is ignored.

For example, under Section 6(d)(1), unless the manufacturer could readily attach warnings to the product itself, the manufacturer is automatically absolved from warning the ultimate user if it warns a third party who could reasonably be expected to warn the ultimate user—regardless of the probability that harm will occur and the magnitude of that harm if the manufacturer does not warn the ultimate user. Moreover, Section 6(d)(1)(C) absolves the manufacturer even if it could not reasonably expect the third party to warn the ultimate user (1) if the product was incorporated into another product, or (2) if there was no practical way to warn the ultimate user and either the product was used in a workplace or the ultimate user was not an employee of the manufacturer's immediate buyer.

The Restatement explains why balancing the risk to the ultimate user of not warning against the burden on the manufacturer of warning is both sensible and equitable, and why setting out rules based only on the latter factor, as in the Kasten bill, is neither sensible nor equitable. Restatement section 388, comment n provides in part:

"All sorts of chattels may be supplied for the use of others, through all sorts of third persons and under an infinite variety of circumstances. This being true, it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel. . . . Since the care which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serious harm to those who use them and those in the vicinity of their use, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character."

¹⁵ See memo from A. Watson and R. Perlmutter, Attorney-Advisors, to H. Stephen Halloway, Associate General Counsel for Legislation and Regulation, Department of Commerce, Feb. 11, 1983.

Under the Kasten bill, however, the same rule applies whether the product involves little risk or grave risk, and whether the harm caused would be minimal or catastrophic.

4. The "Obvious Danger" Escape Hatch

The general rule set out in section 6(d)(2)(A) of the Kasten bill—that a manufacturer has no duty to warn about dangers that are obvious—is today the majority rule.¹⁶ But the Kasten bill broadens this manufacturer defense in two ways. First, it automatically absolves the manufacturer of liability if the danger is obvious to the intermediate purchasers identified in section 6(d)(1) even if it is not necessarily obvious to the ultimate product user. See discussion at pp. 21-22, *supra*. Second, it automatically absolves the manufacturer if the danger is obvious to a "reasonably prudent product user," even if someone who is not a reasonably prudent product user—e.g., a child—is likely to use the product and suffer injury from it.

Ironically, the Seventh Circuit, which includes Senator Kasten's own state of Wisconsin, has emphasized that a manufacturer "owe[s] all who might come in contact with" the product, and not just reasonably prudent product users, a duty to warn. See *DeSantis v. Parker Feeders, Inc.*, 547 F.2d 357, 364 (1976) (emphasis by the court) (boy lost leg after becoming entrapped in sharp blades of automatic cattle feeder).

5. The "Misuse" Escape Hatch

Section 6(d)(2)(B) of the Kasten bill absolves the manufacturer if it fails to warn of "the consequences of product misuse, as defined in section 10(a)(2)." Section 10(a)(2) defines misuse as occurring (1) when a product is used in a way that "is not consistent with the warnings or instructions available to the user," (2) when a product is used in a way that is "not consistent with reasonable practice of users of the product," or (3) when "a product user fails adequately to train another person in the safe use of the product."

Under current law, on the other hand, the plaintiff's "misuse" must be unforeseeable to absolve the manufacturer. See e.g., *Porter v. United Steel and Wire Co.*, 436 F.Supp. 1376 (N.D. Iowa 1977). As the Schwartz Task Force concluded in 1979:

"The test for establishing whether a plaintiff's conduct in relation to a product should bar his recovery is whether the plaintiff's manner of use was foreseeable. Foreseeability seems firmly accepted as the preferred standard for evaluating the legal consequences of a plaintiff's conduct because of the broad protection which it affords plaintiffs in comparison with other standards."¹⁷

Dean Prosser explained why the manufacturer should be liable unless the misuse was unforeseeable:

"There are some relatively unusual uses of a product which the seller may reasonably be expected to foresee and guard against; and he may have reason to know of an otherwise unforeseeable use made by those whom the product will reach, and so be required to take precautions. Likewise, even in the case of normal uses, there may be a recognizable danger that the product will get into the hands of children or other wrong people, which will call for steps to guard against it. In such cases, the manufacturer is not relieved."¹⁸

Under the Kasten bill, in contrast, the manufacturer is relieved.

In addition, section 6(d)(2)(B), since it absolves the manufacturer of "the consequences of" product misuse, can be read to necessarily bar—rather than simply reduce—the plaintiff's recovery when he or a third party misuses a product. This is inconsistent with the comparative fault scheme the bill purports to establish in Section 9 and 10.

6. The "Alteration or Modification" Escape Hatch

Section 6(d)(2)(C) of the Kasten bill absolves the manufacturer when it fails to warn about the consequences of alteration or modification, even where alteration or modification is foreseeable. Under current law, on the other hand, the manufacturer is absolved from liability only where the alteration or modification is unforeseeable. As the court noted in *Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1020 (8th Cir. 1974):

¹⁶ A product that is obviously dangerous, however, may well be defectively designed. See discussion at pp. 12-14, *supra*.

¹⁷ Schwartz Task Force, at App.-709.

¹⁸ Prosser, Torts, at 668-70 (4th ed. 1971).

"The law recognizes that there can be strict liability of a supplier even though the product is altered or changed if it is foreseeable that the alteration would be made and the change does not unforeseeably render the product unsafe."

More recently, another federal court explained that "by its very terms, section 402A seems to indicate that only unexpected substantial changes will absolve the seller of a product from liability for injuries caused by that product."—*Merriweather v. E. E. Bliss Co.*, 636 F.2d 42 (3rd Cir. 1980).

The Kasten bill does not relieve the manufacturer from liability for alteration or modification that constitutes "reasonably anticipated conduct." However, it defines such conduct as that "which could be expected of a reasonably prudent person who is likely to use or become exposed to the product in the same or similar circumstances." The flaw in this definition is that many people who are not reasonably prudent—e.g., children—may well be likely to use the product. Thus, while the manufacturer must guard against foreseeable alterations or modifications under current law, under the Kasten bill he need guard against only those alterations or modifications that a reasonably prudent person would make, even if others are foreseeable.

In addition, just as section 6(d)(2)(B) absolves the manufacturer of "the consequences of" product misuse, Section 6(d)(2)(C) absolves the manufacturer of "the consequences of" alteration or modification. This can be read to necessarily bar—rather than simply reduce—the plaintiff's recovery when he or a third party alters or modifies a product, thus undercutting the comparative fault scheme the bill purports to set up in Sections 9 and 10.

C. Section 8—Elimination of strict liability for nonmanufacturers

Section 8 of the Kasten bill eliminates strict liability for all defendants except manufacturers,¹⁹ and substitutes a traditional negligence standard.²⁰

Under current law, on the other hand, middlemen—retailers and distributors—like manufacturers, can be found strictly liable. See, e.g., *Dunham v. Vaughan and Bushnell*, 247 N.E.2d 401 (Ill. 1969); *Vandermark v. Ford*, 391 P.2d 168 (Cal. 1964); *Suvada v. White Motor*, 210 N.E.2d 182 (Ill. 1965); Restatement of Torts (Second), § 402A, comment f. As the court explained in *Vandermark*:

"Retailers, like manufacturers, are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. . . . [T]he retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. [This] works no injustice to the Defendants, for they can adjust the cost of such protection between them in the course of their continuing business relationship."²¹

Thus, the Schwartz Task Force observed in 1977 that, "most courts extended strict liability to retailers and distributors, in part, on the assumption that those groups would place pressure on the manufacturer to produce safe products. . . . Courts also believed that retailers and distributors might be more accessible to suit than manufacturers."²²

Section 8 of the Kasten bill would totally bar recovery in construction defect cases where the plaintiff can prove that the product was defective when he bought it, but not that it was defective when it left the manufacturer's hands. As Dean Keeton recently told Senator Kasten:²³

"Many accidents occur, especially after products have been installed, where it is clear that the product was defectively flawed somewhere in the manufacturing process, either at the construction level or in the marketing process, but in no way was the plaintiff to identify at what point in time the flaw occurred."

Under current law, the plaintiff can recover from the retailer—since the defect was present when the retailer sold it and the retailer is strictly liable—and the re-

¹⁹ A nonmanufacturer product seller does remain strictly liable, like the manufacturer, for construction defects (no defendant is ever strictly liable for a design defect or for failure to warn) if the manufacturer cannot be served or is insolvent.

²⁰ The difference between the negligence the plaintiff must prove to hold non-manufacturers liable and the "negligence" the plaintiff must prove to hold a manufacturer liable is striking. For non-manufacturers, the Kasten bill straight-forwardly substitutes simple traditional negligence for strict liability: A seller is liable if he "fail[s] to exercise reasonable care" under Section 8(a)(1)(B). For manufacturers, on the other hand, sections 5 and 6 of the Kasten bill require the plaintiff to prove much more than negligence. See discussion at pp. 6-10, 20 *supra*.

²¹ 391 P.2d at 171.

²² Schwartz Task Force at App.-683.

²³ Testimony of Page Keeton, Professor of Law, University of Texas, before the Consumer Subcommittee, Senate Commerce Committee, Apr. 6, 1983.

tailer and the manufacturer then determine between themselves who pays what percentage of the damage. Under the Kasten bill, on the other hand, the victim (1) cannot recover from the manufacturer even under a strict liability standard because he cannot prove the product was defective when it left the manufacturer's hands, and (2) cannot recover from the retailer because he cannot prove the retailer's negligence (and in fact the retailer may not have been negligent). Examples cited by Dean Keeton include cases where someone is injured by a car or a boiler that explodes and the explosion destroys the evidence.

Moreover, section 8, while often preventing the plaintiff's recovery, will not prevent the retailer from being sued. As Dean Wade explained to the subcommittee staff, "Plaintiff's attorney will still join the retailer, alleging negligence, thinking that the manufacturer may be able to prove that something happened to the product after it left him."²⁴

D. Section 9—Elimination of joint and several liability

Under traditional tort law, tortfeasors responsible for the same injury are jointly and severally liable—i.e., the plaintiff gets his full recovery from one or more of the defendants that have caused his injury, and it is then up to the defendants to straighten things out among themselves. E.g., *Wiebe v. Seely*, 215 Ore. 331 (1959) ("Each is liable for the whole, and the injured party may pursue one separately, or he may pursue all jointly, or any number jointly less than the whole number"); *Richardson v. Volkswagenwerke, A.G.*, 552 F.Supp. 73 (W.D. Mo. 1982). The California Supreme Court explains that the joint and several liability rule, "frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such case the rule recognizes that fairness dictates that the wronged party should not be deprived of his right of redress, but that the wrongdoers should be left to work out between themselves any apportionment."—*American Motorcycle Assoc. v. Superior Court*, 578 P.2d 899, 901 (Cal. 1978).

Section 9 of the Kasten bill, as Dean Keeton testified, "does something that has never been the law in any but two or three states in the United States. . . . [I]t eliminates the notion of entire responsibility of each of several joint partitioners." Dean Wade agreed, in written comments provided to the Consumer Subcommittee staff, that "it seems quite unfair to 'eliminate' joint and several liability, especially if the claimant was not at fault."

Specifically, section 9(c) directs the court to "enter judgment against each party determined to be liable in proportion to its percentage of responsibility for the claimant's harm." If the plaintiff cannot collect from one of the defendants, he must ask the court, within one year of the judgment, to (1) rule that that defendant's portion of the judgment is uncollectable, and then (2) reallocate that amount among all parties, including the plaintiff, "according to the respective percentages of their responsibilities." Plaintiffs thus are deprived of recovery and must incur additional expenses to prove who is to pay how much.

Section 9 would delay and could prevent the victim's full recovery whenever more than one defendant is responsible for his injury. In *Airco v. Simmons First National Bank*, 276 Ark. 486 (1982), for example, Georgia Hutchinsonson, a hospital patient awaiting surgery, suffered permanent brain damage and serious lung injury because of the negligence both of the manufacturer of a machine used in the anesthetization process and of hospital employees. Under present law, Mrs. Hutchinsonson can get her full recovery from the manufacturer, who may then seek contribution from the hospital employees. The manufacturer rather than the victim shoulders the loss if the employees cannot pay. Under the Kasten bill, however, the loss falls in the first instance—and perhaps permanently—on the victim.

For workers injured in the workplace, section 9 has an even more devastating effect: It virtually guarantees that they will not be fully compensated for their injuries, because of the combination of the elimination of joint and several liability in Section 9, the expansion of the defendant's defenses in Section 10, and the treatment of workmen's compensation benefits in Section 11. See discussion at pp. 31-44, *infra*.

E. Section 10—Expansion of the defendant's affirmative defenses

Sections 10(a) and 10(b) limit liability in two major ways. First, they greatly expand the definitions of misuse, alteration and modification. Second, they hammer the final nail into the coffin of joint and several liability by ensuring that the plain-

²⁴ Notes on Suggested Changes in S. 2631, by John Wade, Professor of Law, Vanderbilt University, Reporter, Restatement (Second) of Torts, in Consumer Subcommittee files.

tiff's recovery is reduced not only by his own misuse, alteration and modification but also by that of any third party, such as an employer, a co-employee, or an intermediate seller.

1. Expanding the Definition of "Misuse"

In *Mickle v. Blackmon*, 166 S.E.2d 173 (S.C. 1969), 17-year old Janet Mickle was thrown forward against the gearshift lever when the Ford she was riding in collided with another car. The knob on the lever shattered on impact, and the lever then pierced through her chest and penetrated to her spine, leaving her permanently paralyzed. Ford argued that it had a duty to make its cars safe for their intended use—driving—but not for other uses—such as crashing—and therefore claimed it should not be liable for an injury caused by a "second collision" occurring after the crash between the occupant of the car and something inside the car. The court held, however, that Ford had a duty to make its cars reasonably safe not only for their intended use, but also for any foreseeable use, such as crashing. The court emphasized that a manufacturer must "be expected to anticipate the environment which is normal for the use of his product," and that "he must anticipate the reasonably foreseeable risks of the use of his product in such an environment."

Today, as the Schwartz Task Force acknowledged in 1977, "foreseeability seems firmly accepted as the preferred standard for evaluating the legal consequences of a plaintiff's conduct."²⁵ Or, as a defender of the auto industry reluctantly admitted in a recent law review article:

"A cornerstone of strict liability is the exclusion of evidence relating to the plaintiff's contributory negligence, unless that conduct constitutes an assumption of the risk of unforeseeable misuse of the product."²⁶

Section 10(a)(2) of the Kasten bill could well reverse the result in *Mickle*, as well as many other "second collision" cases, such as those involving exploding Ford Pinto gas tanks. Whereas current law absolves the manufacturer only when its product is used in an unforeseeable manner, section 10(a)(2) eliminates the foreseeability standard, and absolves the manufacturer whenever (1) its product is used in a way that "is not consistent with the warnings or instructions available to the user," (2) it is used in a way that is "not consistent with reasonable practice of users of the product" or (3) "a product user fails to train another person in the safe use of the product."

By abolishing the foreseeability standard, section 10(a)(2) would allow manufacturers to renew the arguments courts rejected in the *Mickle* and *Larsen* cases—that a collision is not a reasonable use of an automobile, and should therefore create no liability. Therefore, on the basis of any one of the three categories of section 10(a)(2), an auto maker could convince a court that it should have no liability for injuries caused by second collisions—even if it knew its car was likely to explode on slight contact and cause hundreds of deaths and burns a year, and even if it could have avoided those deaths and burns for \$4-8 per car. See discussion at pp. 44-45, *infra*.

2. Reducing the Plaintiff's Recovery Because of the Misuse of a Third Party

Section 10(a)(1) reduces the plaintiff's recovery from the manufacturer not only because of his own misuse but also because of the misuse of any third party, such as an employer, a co-employee, or an intermediate seller. This provision, in combination with the broadened definition of misuse in Section 10(a)(2), could severely limit the recovery of totally innocent plaintiffs.

In *Airco*, for example, Georgia Hutchinsonson suffered permanent brain damage because of both a defectively designed ventilator used in the anesthetization process and the negligence of hospital personnel (see discussion at pp. 30-31, *supra*). An anesthetist had turned a valve on a machine used in the anesthetization process to the wrong position, which caused air to be pumped into Mrs. Hutchinsonson's lungs with no way to escape, resulting in serious damage to her lungs and brain. Airco knew that the ventilator valve could be turned to the wrong position—it had happened before, and had caused serious injury and death—and other machines that served the same purpose but eliminated the possibility of human error were available at no additional cost.

The Arkansas Supreme Court held *Airco* liable, because an anesthetist's turning the selector valve to the wrong position, while negligent, was clearly foreseeable. As

²⁵ Schwartz Task Force at App.-709.

²⁶ Werber, *The Product Liability Revolution—Proposals for Continued Legislative Responses in the Automotive Industry*, 18 New England L.Rev. 1, 15 (1982). See also *Larsen v. GM*, 391 F.2d 495 (8th Cir. 1968); Twerski, *The Many Faces of Misuse*, 29 Mercer L. Rev., 403 (1978).

one of the defendants in *Airco* admitted, the selector valve on the Airco machine "is absolutely a time bomb, and anybody that sits there and connects it a few thousand times, they're going to misconnect it sooner or later."

Under the definition of misuse in the Kasten bill, Mrs. Hutchinson's recovery from Airco would have been dramatically reduced because the nurse-anesthetist's turning the selector valve, even though foreseeable, is clearly misuse within the meaning of section 10(a)(2) of the bill, and the victim's recovery is reduced not only by his own misuse but by the misuse of "any person other than the defendant" under section 10(a)(1).

3. Expanding the Definition of "Alteration or Modification"

The Kasten bill expands the definition of alteration or modification in the same way that it expands the definition of misuse. Under current law, manufacturers are liable when their products are altered or modified in foreseeable ways, whether or not such alterations or modifications are those of a reasonably prudent person. *Merriweather v. E. W. Bliss Co.*, supra; *Hales v. Green Colonial, Inc.*, supra; see discussion at pp. 31-33, supra. Under Sections 10(b)(1)(C) and 2(13) of the Kasten bill, on the other hand, the manufacturer is only liable if the alteration or modification "would be expected of a reasonably prudent person." The Kasten bill thus absolves the manufacturer where an alteration is foreseeable but not reasonably prudent.

4. Reducing the Plaintiff's Recovery Because of the Alteration or Modification of a Third Party

Section 10(b)(1) treats alteration and modification just as section 10(a)(1) treats misuse: It reduces the plaintiff's recovery from the manufacturer not only because of the plaintiff's own alteration or modification but also because of the alteration or modification of any third party, such as an employer, a co-employee, or an intermediate seller.

This provision would have particularly severe consequences in the work place. Not infrequently, an employer or co-employee modifies a product—say, by removing a safety device that causes some inconvenience—in a way that is clearly foreseeable but is equally clearly not the conduct of a reasonably prudent person. Under current law, the manufacturer has a duty to guard against such conduct. See e.g., *Steinmetz v. Bradbury Co., Inc.*, 618 F.2d 21 (8th Cir. 1980). Under the Kasten bill, on the other hand, he would have no such duty, both because the alteration is not that of a "reasonably prudent person" under section 2(13) and because it was made by a third party under section 10(b)(1).

Section 10(b)(1) would both reduce the recovery of someone who has already been injured and make it more likely that people will be injured in the future, since the manufacturer knows he will not have to pay for injuries caused by foreseeable but not reasonably prudent modifications—whether those modifications are made by the plaintiff, his employer, another employee, an intermediate seller, or anyone except the manufacturer himself.

5. Expanding the Defense of Contributory Negligence

Today, most states have adopted comparative fault, under which the plaintiff's contributory negligence will reduce his recovery, but will not bar it. The Kasten bill purports to adopt comparative fault, but undercuts a true comparative fault standard in two ways. First, section 10(c)(1) allows the plaintiff's contributory negligence to bar totally—not just reduce—his recovery; this gives the manufacturer the best of both the comparative fault and the contributory negligence standards. A plaintiff today clearly cannot (and should not) recover if his injury occurs solely because of his own negligence—i.e., if the product is simply not defective. Under the Kasten bill, however, the plaintiff's recovery can be barred totally even if the product is defective.

Second, Section 10(c)(2)(A) broadens the definition of contributory negligence.²⁷ Section 402A of the Restatement²⁸ emphasizes that "[c]ontributory negligence is

²⁷ Section 10(c) is poorly drafted. It defines three terms—negligence, contributory negligence, and assumption of the risk—in three different subparagraphs, with no indication as to which subparagraph defines which term. In fact, section 10(c)(2)(A) expands the definition of contributory negligence, and section 10(c)(2)(B) expands the definition of assumption of the risk. See pp. 38-41, infra. Section 10(c)(2)(C) adds to the confusion by defining "negligence, contributory negligence or assumption of risk" to also include misuse, alteration and modification, terms which are covered in Sections 10(a) and 10(b).

²⁸ Restatement (Second) of Torts, § 402A, comment n.

not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." As the Supreme Court of Oregon recently held, the product user's negligence is a factor in determining the extent of liability:

"... unless the user's alleged negligence consists in the kind of unobservant, inattentive, ignorant, or awkward failure to discover or to guard against the defect that goes toward making the product dangerously defective in the first place." (*Emphasis supplied*).—*Sandford v. Chevrolet Div. Gen. Motors*, 292 Ore. 590, 598 (1982). Similarly, the Schwartz Task Force has recognized that "the negligent failure to discover a defective condition . . . will not bar recovery." Schwartz Task Force at App.-711. See also *Williams v. Brown Manufacturing Co.*, 45 Ill.2d 418, 430 (1970); *Kassouf v. Lee Bros.*, 26 Cal. Rptr. 276 (1962) (wormy candy bar eaten before discovery of defect).

Under the Kasten bill, in contrast, the negligent failure to discover a defective condition must reduce recovery and can even bar it completely, since section 10(c)(2)(A) defines contributory negligence as occurring "when the claimant, while using the product, was injured by a defective condition that would have been apparent, without inspection, to an ordinary reasonably prudent person."

6. Expanding the Defense of Assumption of the Risk

The Schwartz Task Force has observed correctly that the elements of the defense of assumption of risk are "knowledge of the danger or defect, and a voluntary and unreasonable encounter of it." Schwartz Task Force at App.-705. *Accord*, Restatement (Second) of Torts, § 402A comment n; 5 Frumer and Friedman, Product Liability section 16A(5)(f) at 3B-218 ("[L]iability hinges on whether or not the plaintiff proceeded unreasonably after knowledge and appreciation of the danger. Whatever terminology is used, the result is the same—a plaintiff must be aware of the danger, appreciate the risk and then proceed unreasonably").

Under the Kasten bill's definition of assumption of the risk, on the other hand, the plaintiff's action can be completely reasonable yet his recovery can still be reduced or barred: Section 10(c) (2) (B) defines assumption of the risk as occurring "when the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product." The drafters of the Model Uniform Product Liability Act ("UPLA") have suggested that such a definition is unfair to the plaintiff.²⁹ As the commentary to UPLA emphasizes: "[T]here may be cases where an individual voluntarily uses a product with a known defective condition, but the reasonableness of this conduct becomes a matter of dispute. For example, if a person discovers a welt in a tire, should that person be required to stop immediately and call for assistance, or is it reasonable to proceed to a nearby gasoline station to have the tire repaired?"—Model Uniform Product Liability Act, 44 Fed. Reg. 62714, 62738 (1979).

UPLA would have allowed the jury to decide whether the driver in such a case acted unreasonably—and therefore whether the plaintiff's damages should be reduced or barred—but the Kasten bill would automatically reduce or bar the plaintiff's damages, since his actions were clearly voluntary, whether or not they were unreasonable.³⁰ See also *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974); *Ford Motor Co. v. Lee*, 229 S.E. 2d 379 (Ga. 1976) (Ford claimed plaintiff's car did not jump from park to reverse, but that even if it did, plaintiff assumed the risk and Ford should not be liable).

The Kasten bill thus allows reasonable assumption of the risk both to bar and to reduce the plaintiff's recovery. Under the Uniform Comparative Fault Act ("UCFA"), in contrast, reasonable assumption of the risk can do neither. As Dean Wade, the principal drafter of the UCFA, has emphasized, reasonable assumption of the risk is simply "not intended to be included within the [Uniform Comparative Fault] Act." Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 Mercer L. Rev. 373, 383 (1979).

²⁹ Victor Schwartz was a principal drafter of UPLA.

³⁰ Dean Wade gives the following example: "Suppose a father sees his child about to be run over by defendant's speeding car. He dashes out into the street and pushes the child aside but is himself hit and injured. He saved the child's life at the deliberate risk of his own body, but his conduct may be found to be reasonable under the circumstances. If so, he was not at fault and his conduct should not affect the measure of his recovery."—Wade, *Products Liability and Plaintiff's Fault*, 29 Mercer L. Rev. 373, 383 (1979). In *Eckert v. Long Island Ry. Co.*, 43 N.Y. 502 (1871), similar conduct by the plaintiff did not affect his recovery, nor would such conduct affect recovery today. Under the Kasten bill, on the other hand, recovery would be reduced and could be barred.

The provisions in the Kasten bill expanding the defenses of contributory negligence and assumption of risk would have a particularly severe effect on injured workers. For example, under current law an employee who works on or around a dangerous piece of equipment while under a direct command from his employer has not acted unreasonably and thus has not assumed the risk of being harmed by the equipment. See, e.g., *Merced v. Auto Pak Co.*, 533 F.2d 71, 80 (2d Cir. 1976). Under the Kasten bill, on the other hand, a manufacturer can argue that the employee assumed the risk, since he voluntarily—though not unreasonably—encountered the danger. See also *Rhoads v. Service Machine Co.*, 329 F.Supp. 367, 380-81 (E.D. Ark. 1971) (employee's hand and arm crushed by punch press); *Bartkewick v. Billinger*, 247 A.2d 603 (Pa. 1968) (plaintiff injured while reaching into glass-breaking machine to prevent jamming while employer was operating machine); *Inouye v. Pacific Gas & Electric Co.*, 348 P.2d 208, 211 (Cal. 1960) (employee electrocuted when aluminum pole touched negligently maintained electric wires); *Hedding v. Pearson*, 173 P.2d 382 (Ct. App. Cal. 1946) (truck ran over plaintiff's legs while plaintiff, pursuant to foreman's direction, was welding plate in driveway).

F. Section 11—Preventing workers injured in the workplace from obtaining a full recovery

1. Eliminating Joint and Several Liability

The workers' compensation system is a no-fault system: the employee is compensated for an injury suffered on the job, regardless of who is at fault, but he gets a very small recovery³¹ and he gives up his right to bring a product liability suit against the employer.

On the other hand, the worker can still sue the manufacturer of the machine that injured him. If he proves the machine defective, he recovers regular tort damages from the manufacturer; if he cannot, he recovers nothing from the manufacturer.

In many cases, the employer is the party most at fault. He may, for example, fail to pass along a warning or modify a product. Yet because the employer's liability is limited by statute, but the manufacturer's is not, the manufacturer often ends up paying more than the employer.

The current trend in the law—although not yet the majority rule—is to allow the manufacturer to seek contribution from the employer.³² It is true that workers' compensation has traditionally been the worker's exclusive remedy against the employer, and that allowing the manufacturer to seek contribution from the employer undercuts this exclusivity. But if the suit is not allowed, a relatively faultless manufacturer often ends up paying for injury that a negligent employer in fact has caused.

Professor Arthur Larson, the nation's leading expert on workers' compensation law, has suggested that the fairest and simplest solution is to prohibit the manufacturer from suing the employer, and simply to reduce the plaintiff's recovery against the manufacturer by the amount of the worker's compensation benefits. "There is something for everybody in this wholesale compromise," according to Professor Larson. See A. Larson, *Third Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 540.

In contrast, the Kasten bill satisfies both the employer and the manufacturer but unjures the worker. Section 11(c) provides that the manufacturer may not sue the employer, which satisfies the employer; sections 11(a) and 9(c) provide that the manufacturer is only liable "in proportion to its percentage of responsibility for the claimant's harm," which satisfies the manufacturer. But the victim gets less than full recovery. For example, suppose total damages are \$100, the manufacturer is 25 percent at fault and the employer is 75 percent at fault. The victim will recover \$25 from the manufacturer, but only his workers' compensation award, which would be much less than \$75, from the employer.³³

³¹ In 1981, the 32 states that had no statutory limit on workers' compensation disability benefits paid a median annual benefit of \$12,175 to a totally disabled worker with no dependents. Fifteen of the 18 states with statutory limits on total disability benefits had a limit of less than \$80,000, with the highest limit being \$132,400. J. Liebman and R. Sandy, *supra* note p. 12. In contrast, product liability awards can be well into the millions.

³² E.g. *Dole v. Dow Chemical Co.*, 331 N.Y.S. 2d 382 (1972); *Skinner v. Reed-Prentice Division Packaging Machinery Co.*, 374 N.E. 437 (Ill. 1977).

³³ On the other hand, if an injured employee's workers' compensation award is greater than the percentage of the employer's responsibility for the employee's harm—e.g., the employee's total damages are \$100, the employer is 10 percent at fault but the employee's workers' compensation benefits are \$25—the employee's recovery against the manufacturer is reduced by the amount of his workers' compensation benefits. The manufacturer therefore pays only \$75 despite being 90 percent at fault. Section 11(a).

The interaction of the workers' compensation system with the private product liability litigation system inevitably causes problems; no solution is perfect. But the Kasten bill picks the "solution" that causes all the unfairness to fall on the victim. As an April 20, 1983, internal Commerce Department memo to Secretary Baldrige observed:

"Each of these provisions [relating to workmen's compensation] would to some extent overrule existing state laws, to the benefit of manufacturers and employers and at the expense of injured employees."⁴⁴

2. Requiring Workers To Exhaust Their Administrative Remedies

Finally, section 11(a) of the Kasten bill requires workers to exhaust their administrative remedies under the workers' compensation system before filing a private suit. Under current law, on the other hand, a worker injured on the job can file a private suite against the manufacturer at the same time that he files his workers' compensation claim. With many occupational injuries, such as those caused by asbestos, the victim dies before he can recover anything. The exhaustion requirement alone would therefore delay—and many times prevent—injured workers from being compensated for their injuries.⁴⁵

G. Section 13—Restricting the availability of punitive damages

In the 1970s, the Ford Motor Company made Pintos with gas tanks that exploded in collisions at moderate speeds. Internal Ford documents proved that Ford knew (1) that its Pinto gas tanks were likely to explode, (2) that those explosions were likely to kill and severely burn people, and (3) that the gas tanks could be fixed and the deaths and burns prevented for between \$4 and \$8 per car. Internal Ford documents also revealed that Ford had prepared a cost-benefit analysis demonstrating that the costs of making this \$4 and \$8 per car improvement outweighed the benefit of avoiding deaths and burns of Pinto passengers. Thus, Ford did not make the improvement and hundreds of people were killed and burned who could have been saved for between \$4 and \$8 per car. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

Richardson-Merrell (RM) began distributing a drug called MER/29 in 1960. MER/29 was supposed to reduce cholesterol, but didn't. It did, however, cause cataracts. Before marketing the drug, RM conducted six tests which showed that MER/29 caused cataracts and other abnormalities in mice, but RM lied about the tests in reports to the FDA. Doctors and researchers soon began reporting to RM that patients and animals consuming MER/29 were suffering adverse side effects, but RM continued to market MER/29, resisted FDA requests to withdraw MER/29 from the market, and continued to advertise MER/29 as safe. Only after FDA officials made a surprise visit to RM laboratories and confiscated its animal experiment records did RM withdraw MER/29 from the market. See *Toole v. Richardson Merrell*, 251 Cal. App.2d 689 (1967).

Not surprisingly, under present law both Ford and Richardson-Merrell have had to pay significant punitive damage awards. The Kasten bill reduces the amount corporations are likely to pay when punitive damages are awarded, by transferring the power to determine the amount of punitive damages from the jury to the judge. Members of the Reagan Administration have expressed opposition to this provision and in fact have questioned its constitutionality. As the April 20, 1983, Commerce Department memo stated:

"The Administration opposed provisions removing from the jury the responsibility of setting punitive damages in product liability actions . . . The Administration position reflected the strongly held view of the Department of Justice that there was no evidence of the existence of a national problem in this area, and furthermore that, in light of the quasi-criminal nature of punitive damages, a jury trial on the issue may be required by the Constitution."⁴⁶

⁴⁴ The memo was not reproducible and is in the Committee files.

⁴⁵ Proponents of the Kasten bill, recognizing the serious problems with Sections 9, 10, and 11, have drafted major suggested revisions. The new working draft retains, however, among other things, the expanded definitions of misuse, modification, alteration, contributory negligence, and assumption of the risk, the inequitable treatment of workers' compensation benefits and product liability awards, and the requirement that a worker exhaust his administrative remedies before filing a product liability suit.

⁴⁶ The trial and appellate courts already exercise control over the outer limits of jury discretion in the forms of reversal and remittitur. In the Ford Pinto case, for example, the court reduced punitive damages from \$125 million to \$3.5 million.

In addition, the bill makes it less likely that punitive damages will be awarded at all. Under present law, punitive damages may be awarded where the defendant acted "with conscious, reckless indifference to the risk that its product may be excessively dangerous to consumers." Ghiardi and Kircher, *Punitive Damages*, § 6.19 (1981); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1326 (1974). The Kasten bill retains the "conscious, reckless indifference" standard (although the bill uses "flagrant" rather than "reckless"), but also requires the plaintiff to prove that the defendant's conduct constituted "an extreme departure from accepted practice." Thus, if all members of an industry engage in reckless, outrageous conduct, that conduct becomes the accepted practice, and therefore no member of the industry can be held liable for punitive damages.

Under present law, on the other hand, "a defendant's conformance with industry standards does not preclude, as a matter of law, a finding that a manufacturer acted with reckless disregard of plaintiff's rights." Ghiardi and Kircher, *Punitive Damages*, § 6.25; *Gryc v. Dayton-Hudson Corp.*, 297 N.W. 2d 727 (Minn. 1980); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 964 (N.D. Tex. 1978) ("Yet conformity to industry practice is not necessarily a defense to fault. An entire industry may be negligent or inattentive").

Moreover, the Kasten bill requires the plaintiff to prove both "reckless indifference" and "extreme departure from accepted practice" by "clear and convincing" evidence, a much higher standard than the "preponderance of the evidence" standard under existing law.

H. Section 14—Suppressing evidence of post accident product improvements

Under the traditional rule of evidence, as presently embodied in Rule 407 of the Federal Rules of Evidence, evidence of subsequent remedial measures is not admissible to prove liability but is admissible for other purposes, such as proving ownership, control or the feasibility of precautionary measures.³⁷ Thus, the evidence typically gets to the jury, but the judge instructs the jury not to consider the evidence on the issue of liability. The rationale is that manufacturers would be less likely to correct known product defects if they knew those corrections could be used against them in a lawsuit.

In recent years, however, the trend—although not yet the majority rule—has been to admit such evidence on the issue of liability, for at least three reasons.³⁸ First, such evidence is logically relevant; the manufacturer would not have made the change if it did not think it would make its product safer. Second, the doctrine of "limited admissibility" has always been regarded with skepticism; many have argued that regardless of the court's limiting instructions the jury cannot help considering evidence of subsequent repairs on the issue of liability. Third, even manufacturers themselves, such as Ivan Brand of the Vermeer Corporation, admits that "if a design change needs to be made, we make it."³⁹ A rational manufacturer is not going to avoid making an improvement in a product he knows is dangerous and is likely to result in future lawsuits solely because evidence of the improvement may be admitted in pending lawsuits.

The Kasten bill would prohibit the admission of subsequent repairs to prove liability, thus preventing the modern trend from becoming the majority rule. In addition, it would overrule even the current majority rule of "limited admissibility" by prohibiting the admission of subsequent repairs to prove anything unless the defendant "has expressly denied the feasibility" of making repairs or offers evidence of subsequent repairs in defense to a request for punitive damages.⁴⁰ Thus, the defendant has the exclusive power to determine when, if at all, evidence of subsequent repairs will be admitted in product liability cases.

Subsequent remedial measures would continue to be admissible in non-product liability cases. Such special treatment of subsequent remedial measures in products cases would seem difficult to justify.

³⁷ E.g., *Bailey v. Kawasaki Kiseh*, 455 F.2d 392 (5th Cir. 1972); *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961); *Steele v. Wiedemann Mach. Co.*, 280 F.2d 380 (3rd Cir. 1960).

³⁸ E.g., *Farmer v. Paccar*, 562 F.2d 518 (8th Cir. 1977); *Robbins v. Farmer's Union Grain Terminal*, 522 F.2d 788 (8th Cir. 1977); *Ault v. Int'l Harvester Co.*, 177 Cal. Rptr. 812 (1974); *Caprara v. Chrysler Corp.*, 417 N.E.2d 545 (N.Y. 1981).

³⁹ Testimony of Ivan Brand, Vermeer Corp., before the Consumer Subcommittee, Senate Commerce Committee, April 6, 1983.

⁴⁰ The Kasten bill restricts the admissibility of subsequent remedial measures when admissibility would benefit the victim (section 14(a)), but expands the admissibility of such measures when admissibility would benefit the manufacturer (section 13(d)).

I. Section 4(c)—Requiring the victim to relitigate issues that have already been litigated

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Supreme Court held that trial courts had discretion to rule—but were not required to rule—that an issue already fully litigated and ruled upon in one case need not be relitigated in another case. This doctrine is known as “collateral estoppel,” and allows courts to reduce greatly the time and expense of relitigating issues that have already been decided in a previous case. Since *Parklane*, courts have allowed collateral estoppel in some cases and not in others, depending on whether the issue sought to be “collaterally estopped” in the second case was necessarily decided in the first case. For example, in *Kaufman v. Eli Lilly*, Index No. 21234/75 (N.Y. Supreme Court 1982), the court held that the issues necessarily decided in *Bichler v. Eli Lilly*, supra—e.g., that Lilly had unreasonably failed to test DES in humans—estopped Lilly from relitigating the same issues in *Kaufman*. The court rejected Lilly’s argument that collateral estoppel should not be applied because Lilly had made strategic trial errors in *Bichler* it would not make in *Kaufman*.

Section 4(c) of the Kasten bill overrules the Supreme Court’s *Parklane* decision, by prohibiting the use of collateral estoppel in all product liability cases except those based on harm caused by the same event in which two or more persons were injured, principally mass accident cases. In all non-product liability cases, on the other hand, collateral estoppel would continue to be allowed. Such special treatment would seem difficult to justify.

Many Reagan administration officials have opposed the Kasten bill’s prohibition on the use of collateral estoppel. As the Commerce Department’s April 20, 1983, memo points out, “The Department of Justice opposed a prohibition of the use of this rule because they found insufficient evidence that a problem existed in this area for which a federal solution was appropriate.”

J. Section 12—Prohibiting suits by people injured by defectively designed capital goods more than 25 years old

Perhaps the most obvious limitation on liability in the Kasten bill is the statute of repose in section 12: it absolutely bars suits by people injured by capital goods that are more than 25 years old if the product causing the injury was defectively designed or lacked an adequate warning.⁴¹ Thus, if the Kasten bill were the law, a person injured today by an exploding boiler made in 1959 could sue the manufacturer but someone injured by one built in 1957 could not. Similarly, families of plane crash victims could sue Boeing if the plane was a 727 built in 1967 but not if it was a 707 built in 1957.

Because of its arbitrary pre-injury cut-off of plaintiffs’ rights, section 12 is probably unconstitutional. The courts of four states have expressly held that recently-enacted statutes of repose for product liability suits violate state constitutional provisions prohibiting the deprivation of property—i.e., the right to seek redress for injury—without due process. See *Health v. Sears Roebuck*, 123 N.H. — (July 18, 1983); *Lackford v. Sullivan*, 416 So.2d 996 (Ala. 1982); *Bollick v. American Barnag Corp.*, 284 S.E.2d 188 (N.C. Ct. App. 1981), modified and affirmed, 293 S.E.2d 415 (N.C. 1982); *Battilla v. Allis Chalmers Mfg. Corp.*, 392 S.2d 874 (Fla. 1981). In addition, as the New Hampshire Supreme Court indicated, product liability statutes of repose may deny the equal protection of the law to people injured by defective products. As the court pointed out, there is no rational basis for denying victims of defective products access to the courts while allowing all other victims access. If the Kasten statutes of repose were enacted, a person paralyzed after being hit by an old defectively designed car could sue the driver of the car for negligence, but could not sue the car manufacturer.

Two federal courts have also expressed hostility toward product liability statutes of repose,⁴² and courts in additional states have held statutes of repose in other contexts unconstitutional.⁴³ According to the reasoning of all these courts, the federal

⁴¹ The Kasten bill would permit suits against manufacturers who intentionally conceal the defective nature of their product for injuries caused by the cumulative effect of exposure to a defective product, or for injuries that were caused before but did not manifest themselves until after the 25-year period. Section 12(b).

⁴² *Ferguson v. Sturm Ruger & Co.*, 524 F. Supp. 1042 (D. Ct. 1981); *Tate v. Eli Lilly*, 522 F. Supp. 1048 (M.D. Tenn. 1981).

⁴³ *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973); *Fujioka v. Kam*, 514 P.2d 568 (Ha. 1973); *Skinner v. Anderson*, 231 N.E.2d 388 (Ill. 1967); *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977); *Broome v. Truluck*, 241 S.E.2d 739 (S.C. 1978); *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454 (Wis. 1975); *Phillips v. ABC Builders*, 611 2d 821 (Wyo. 1980).

statute of repose contained in the Kasten bill would be likely to violate both the due process and equal protection clauses of the United States Constitution.

Even if Section 12 could withstand constitutional challenge, however, its limitation on liability is unjustified. Those who favor a nationwide statute of repose make three major arguments. First, they argue that when someone is injured by an old product, the injury must have been caused by ordinary wear and tear rather than a defect in the product. Perhaps the most extreme statement of this view is that of the Kasten Mfg. Corp., who wrote Senator Kasten, "True defective design will become apparent in the first year of use. In fact, it will be rejected by the marketplace quickly if the design is defective."⁴⁴ Under current law, on the other hand, while courts are more likely to hold that ordinary wear and tear rather than a defect in an older product caused an injury, the injured person at least has the opportunity to prove that his injury was caused by a defect in the product. Or as Victor Schwartz and the other drafters of UPLA emphasized a few years ago, "prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe." Model Uniform Product Liability Act, 44 Fed. Reg. 62714, 62732 (Oct. 31, 1979), quoting *Tucker v. Unit Crane & Shovel Corp.*, 256 Or. 318 (1970). In *Fredericks v. American Export Lines*, 227 F.2d 450, 452, Judge Learned Hand observed that "a bomb is nevertheless deadly if it contains a time mechanism." Section 12 of the Kasten bill would legalize "bombs" as long as they contain 25-year mechanisms.

Second, some business groups argue that the lack of a statute of repose has caused product liability insurance rates to rise, since in setting rates insurance companies must take account of injuries that might be caused by products manufactured in prior years as well as those manufactured in the policy year. The drafters of UPLA concluded in 1979, however, that "The limited available data show that insurers' apprehension about older products may be exaggerated," since 83.5 percent of injuries involving capital goods occur within ten years of the time the product was purchased. 44 Fed. Reg. at 62733. Moreover, *Business Insurance* magazine recently reported that "product liability insurance premiums have leveled off or plunged during the last three years." *Business Insurance*, July 27, 1981, at 20.

Finally, some statute of repose proponents make a "two wrongs make a right" argument: because some states already have statutes that are even more restrictive than the Kasten bill's statute, they argue, imposing the Kasten statute on all states would be a net gain for consumers. However, with the exception of Illinois, none of the large industrial states, where the large majority of product liability suits are filed (e.g., California, New York, New Jersey, Pennsylvania, Ohio and Texas) have enacted a statute of repose of any kind. And of the 22 states that have enacted some such statute, five contain not an absolute cut-off of liability but rather a presumption,⁴⁵ which can be rebutted, that a product of more than a certain age has outlived its useful safe life and therefore is not defective. Victor Schwartz and the other drafters of UPLA favored such a presumption. UPLA "does not attempt to apply fixed useful safe life standards for all products," they emphasized; "such an approach is not possible as a practical matter." 44 Fed. Reg. at 62733.

K. Section 3—Restricting jurisdiction to state courts

The final irony of the Kasten bill is its failure to provide for any federal government responsibility for the administration of the product liability system, which will prove counterproductive in two respects. First, the bill could never achieve its stated goal of creating uniformity in the product liability litigation system. Second, it would result in significant, indirect costs to the federal government.

S. 44 purports to be "a bill to regulate interstate commerce by providing for a uniform product liability law, and for other purposes." Its premise is that the states have created such conflicting and inconsistent product liability standards that a federal solution is necessary. Thus, Section 3(c) provides that S. 44 supersede all state product liability laws.

However, while the product liability issue is deemed of such pressing importance that federal legislation is required, the bill rejects any form of federal administration of the product liability system. Section 3(d) expressly withholds jurisdiction from the federal courts over the bill. Passage of S. 44 would constitute the first time ever that Congress has preempted state tort law without at the same time providing

⁴⁴ Comments of Kasten Mfg. Corp., Allenton, Wis., on Product Liability Act, Oct. 22, 1981.

⁴⁵ Data on state statutes of repose are from the statement of the Coalition for Uniform Product Liability Law, Appendix D, in Hearings before the Subcommittee for Consumers on S. 2631, 97th Cong., 2d sess., No. 97-109, at 255 (1982).

for either a federal administrative mechanism or concurrent Federal and State court jurisdiction.⁴⁶

The task of interpreting the new federal standards thus will fall upon the 50 state court systems, which, as Dean Keeton and many other commentators have pointed out, inevitably will interpret these standards in different ways. Because the federal courts, including the Supreme Court, including the Supreme Court, will have no greater role than under current law, resolution of conflicts among the state court interpretations cannot be reasonably expected. Therefore, apart from the many years of confusion that would result from enactment of S. 44's new standards and procedures, uniformity of product liability law ultimately would never be achieved.

The second counterproductive effect of S. 44 is the costs it would impose on the federal government. The bill would relieve manufacturers of liability for the sale of defective products. Someone, however, must bear the costs of injuries caused by such products. Because the bill provides no alternative compensation mechanism, these costs in large part will be shifted to existing federal programs such as Social Security and Medicaid.⁴⁷ By refusing to place any responsibility upon the federal government, Section 3 seeks to avoid the expenditure of federal revenues. In fact, the indirect drain on federal resources may well be enormous.

Comparison Between Kasten Bill (S. 44), Commerce Department Bill (UPLA), and the Restatement (Second) of Torts

Subject	Kasten bill	Commerce bill	Restatement
General standard <u>for design defects</u>	P must prove that "at the earlier of the time of manufacture or Government certification of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation that the manufacturer used." (§5b).	P must prove that "at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product." (§104B).	P must prove that the product is "in a defective condition unreasonably dangerous D is liable even if he has exercised all possible care in the preparation and sale of his product." (§402A).
The "reasonably accepted in scientific community" standard	P must prove that "the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm." (§5b1).	No provision	No provision

⁴⁶ See, e.g., Federal Employers Liability Act, 45 U.S.C. §§ 51 et seq.; Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq.

⁴⁷ See discussion p. 13, supra.

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<u>Subject</u>	<u>Kasten bill</u>	<u>Commerce bill</u>	<u>Restatement</u>
<u>The "practical technological feasibility" requirement</u>	P must prove that "a means to eliminate the danger that caused the harm" was within "practical technological feasibility." (§5b2).	D can avoid liability if it can prove that "it was not within practical technological feasibility for it to make the product safer," unless it "knew or had reason to know of the danger and, with that knowledge, acted unreasonably in selling the product at all." (§107E).	No provision
<u>The "unavoidably dangerous" defense</u>	D is not liable for harm caused by an "unavoidably dangerous aspect" of a product. An unavoidably dangerous aspect is one "which could not, in light of knowledge which was reasonably accepted in the scientific, technical, or medical community at the time of manufacture, have been eliminated without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it." (§5c).	D is not liable for harm caused by an "unavoidably dangerous aspect" of a product, unless he "knew or had reason to know of the aspect and with that knowledge acted unreasonably in selling the product at all." An unavoidably dangerous aspect is one which is "incapable, in light of the state of scientific and technological knowledge at the time of manufacture, of being made safe without seriously impairing the product's usefulness." (§106).	No provision. Comment k to §402A discusses "unavoidably dangerous products," and gives the rabies vaccine as an example, "since the disease itself invariably leads to a dreadful death."
<u>The patent danger rule</u>	"A product is not unreasonably dangerous in design or formulation if the harm was caused by an unsafe aspect of a product which was an inherent characteristic of the product and which would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community." (§5d).	No provision	No provision
<u>The "reasonably accepted in the scientific community" bar to introducing evidence of an alternative design</u>	To get an alternative design admitted into evidence, P must prove that "at the time of the manufacture of the product the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the alternative design, should have known about the alternative design." (§5ell).	No provision	No provision
<u>The "practical technological feasibility" bar to introducing evidence of an alternative design</u>	To get an alternative design admitted into evidence, P must prove that the alternative "utilized only science and technology which was reasonably accepted in the scientific, technical or medical community and...was within practical technological feasibility." (§5e2A).	No provision	No provision

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SubjectKasten billCommerce billRestatement

The "any new hazards it creates for any persons and for any uses" bar to introducing evidence of an alternative design

To get an alternative design admitted into evidence, P must prove that it would have "prevented the claimant's harm and provided equivalent or better overall safety than the chosen design or formula. The overall safety of the alternative design or formula is better than the chosen design or formula if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses." (§5e2b).

No provision

No provision

The "desirable, functionally, economically, and otherwise, to the person who uses or consumes it" bar to introducing evidence of an alternative design

In order to have an alternative design admitted into evidence, P must prove that it would have "been desirable, functionally, economically, and otherwise, to the person who uses or consumes it." (§5e2c).

No provision

No provision

General standard of liability for failure to warn

P must prove that "at the time the product was sold the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm." (§6b1).

P must prove that "at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms rendered the manufacturer's instructions inadequate." (§104c1)

P must prove that the product was "in a defective condition unreasonably dangerous" because of the defendant's failure to warn (§402A). Comment j provides that "in order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning on the container, as to its use."

Absolving the defendant for failure to warn the plaintiff if he warns a third party

D is not liable for failing to warn P if he warns a third party "who could reasonably have been expected to assure that action would be taken to avoid the harm or that the risk of harm would be explained to the actual product user," unless the warning could be easily attached to the product itself; or if he employs "means reasonably calculated" to make a warning available to a "using or supervising expert"; or if he warns his immediate buyer and the product was incorporated into another product," or "there was no practical, feasible means" of warning P and either the product was used in a workplace or P did not work for D's immediate buyer. (§6d1).

D is not liable for failing to warn P if he warns a third party "who may be reasonably expected to assure that action is taken to avoid the harm, or that the risk of harm is explained to the actual product user"; or if he warns a "using or supervisory expert"; or for bulk tangible goods or other workplace products, if he warns the P's employer "if there is no practical and feasible means of transmitting them to the employee-claimant." (§104c5)

"...it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel.....The care which must be taken always increases with the danger involved..."

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Commerce billRestatementThe "obvious danger" defense

D is not liable for failing to warn about "dangers that are obvious." "Dangers that are obvious" are "those of which a reasonably prudent product user or a [third party] would have been aware without a warning or instructions and dangers which were a matter of common knowledge to persons in the same or similar position as the claimant." (§622A).

D is not liable for failing to warn about "dangers that are obvious." (§104B4). "Dangers that are obvious" are not defined.

No provision. Comment j to §402A provides that "a seller is not required to warn with respect to products, ingredients in them, which are only dangerous, or potentially so when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger is generally known and recognized."

The "misuse" defense

D is not liable for failing to warn about "the consequences of product misuse," or of "use contrary to warnings or instructions available to the user or to a [third party]." (§622B). "Misuse" is defined as occurring "when a product is used for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user fails adequately to train another person in the safe use of the product, or otherwise provides for the safe use of the product, and that lack of training or the failure otherwise to provide for the safe use of the product was a cause of the claimant's harm." (§10a2).

D is not liable for failing to warn about "product misuse" as defined as occurring "when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances." (§104C4; §112Ca).

No provision. Comment h to Restatement §402A provides: "If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j) and a product sold without such warning is in a defective condition."

The "alteration or modification" defense

D is not liable for failing to warn about "the consequences of alterations or modifications...which do not constitute reasonably anticipated conduct." "Alteration or modification" is defined as occurring "when a person other than the manufacturer or product seller changes the design, construction, or formula of the product, or removes warnings, instructions, or safety devices that accompanied or were displayed on the product; or when a product user fails to observe the routine care and maintenance necessary for a product and that failure was the cause of the claimant's harm." "Reasonably anticipated conduct" is defined as "conduct which would be expected of a reasonably prudent person who is likely to use or become exposed to the product in the same or similar circumstances." (§§6d2c, 10b2, 2(13)).

D is not liable for failing to warn about "alterations or modifications of the product which do not constitute reasonably anticipated conduct." "Alteration or modification" is defined as occurring "when a person or entity other than the product seller changes the design, construction, or formula of the product, or removes warnings or instructions that accompanied or were displayed on the product." It includes "the failure to observe routine care and maintenance," but not "ordinary wear and tear." "Reasonably anticipated conduct" is defined as "the conduct which would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances." (§§104C4, 112D1, 102G).

No provision. Comment p to §402A provides: "It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability."

Liability of retailers and distributors

P must prove that "the product seller failed to exercise reasonable care with respect to the product." (§8aB).

P must prove that the harm was caused by the "product seller's failure to use reasonable care with respect to the product." (§105A).

P must prove that the product was "in a defective condition unreasonably dangerous." D is liable even if he "has exercised all possible care in the preparation and sale of his product."

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<u>Subject</u>	<u>Kasten bill</u>	<u>Commerce bill</u>	<u>Restatement</u>
<u>Liability where more than one defendant is responsible for harm</u>	"The court shall enter judgment against each party determined to be liable in proportion to its percentage of responsibility for the claimant's harm." (§9c).	"Damages are to be apportioned severally, and not jointly, when a party is responsible for a distinct harm, or when there is some other reasonable basis for apportioning that party's responsibility for the harm. Otherwise, judgment shall be entered against each party liable on the basis of the rules of joint and several liability." (§111B5).	"Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." (§875). "Damages for harm are to be apportioned among two or more causes where a) there are distinct harms, or b) there is a reasonable basis for determining the contribution of each cause to a single harm. Damages for any other harm cannot be apportioned among two or more causes." (§433A).
<u>Definition of misuse</u>	"Misuse" occurs "when a product is used for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user fails adequately to train another person in the safe use of the product, or otherwise provide for the safe use of the product, and that lack of training or the failure otherwise to provide for the safe use of the product was a cause of the claimant's harm." (§10a2).	"Misuse" occurs "when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances." (§112C1).	Restatement §402A, Comment h, provides: "If the injury results from abnormal handling as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition."

<u>Subject</u>	<u>Kasten bill</u>	<u>Commerce bill</u>	<u>Restatement</u>
<u>Reducing P's recovery because of the misuse of a third party</u>	P's recovery against a manufacturer or product seller is reduced to the extent that misuse "by any person other than the defendant manufacturer or product seller" has caused the P's harm. (§10a1).	P's recovery against a product seller is reduced to the extent that misuse "by a party other than the claimant or the product seller" has caused the P's harm. (§112c2).	No provision
<u>Definition of alteration and modification</u>	Alteration or modification occurs "when a person other than the manufacturer or product seller changes the design, construction, or formula of the product, or changes or removes warnings, instructions, or safety devices that accompanied or were displayed on the product; or when a product user fails to observe the routine care and maintenance necessary for a product and that failure was the cause of the claimant's harm." (§10b2).	Alteration or modification occurs "when a person or entity other than the product seller changes the design, construction, or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product." It includes "the failure to observe routine care and maintenance," but not "ordinary wear and tear." (§112d1).	Restatement §402A, comment p, provides: "It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. . . The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes."
<u>Reducing P's recovery because of the alteration or modification of a third party</u>	P's recovery against a manufacturer or product seller is reduced to the extent that alteration or modification "by any person other than the defendant manufacturer or product seller" has caused the P's harm. (§10b1).	P's recovery against a product seller is reduced to the extent that alteration or modification "by a party other than the claimant or the product seller" has caused the P's harm. (§112d2.)	No provision
<u>Contributory negligence--when, and to what extent, it may reduce the plaintiff's damages</u>	"Conduct of the claimant involving. . . contributory negligence. . . shall be considered to occur when the claimant, while using the product, was injured by a defective condition that would have been apparent, without inspection, to an ordinary reasonably prudent person." (§10c2). "The trier of fact may determine that the harm arose solely because of the conduct of the claimant." (§10c1).	"Claimant's Failure to Observe an Apparent Defective Condition. When the product seller proves by a preponderance of the evidence that the claimant, while using the product, was injured by a defective condition that would have been apparent, without inspection, to an ordinary reasonably prudent person, the claimant's damages shall be subject to reduction." (§112a2).	Comment a of §402A provides: "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."

<u>Subject</u>	<u>Kasten bill</u>	<u>Commerce bill</u>	<u>Restatement</u>
<u>Assumption of risk-- when, and to what extent, it may reduce the plaintiff's damages.</u>	"Conduct of the claimant involving... assumption of risk shall be considered to occur when the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product." (§10c2B). "The trier of fact may determine that the harm arose solely because of the conduct of the claimant." (§10c1).	"Use of a Product With a Known Defective Condition By a Claimant. When the product seller proves, by a preponderance of the evidence, that the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assumed the risk or harm from the product, the claimant's damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances. Under this Subsection, the trier of fact may determine that the claimant should bear sole responsibility for harm caused by a defective product." (§112B1).	Section 402A, comment K, provides: "The form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability."
<u>Reduction of damage awards to injured workers</u>	Plaintiff's recovery against a manufacturer is reduced "in proportion to [the employer's] percentage of responsibility for the claimant's harm" if the employer's percentage of responsibility is greater than the amount of the employee's workers' compensation benefits. §9c. It is reduced by "the amount of workers' compensation benefits" if those benefits are greater than the employer's percentage of responsibility. (§11a1)	"Damages shall be reduced by the amount paid as Worker Compensation benefits for the same injury...." (§114A).	No provision.
<u>Requirement that injured worker exhaust his administrative remedies</u>	"If a person eligible to file a claim for workers' compensation benefits has not filed such a claim, or either he or his employer has failed to exhaust their remedies under an applicable workers' compensation law, any product liability action brought by the claimant shall be dismissed without prejudice until those remedies are exhausted." (§11a).	No provision.	No provision.
<u>Statute of repose</u>	"If any product is a capital good, no claim alleging unsafe design or formulation... may be brought for harm caused by such a product more than 25 years from the date of delivery...." (§12a1).	"In claims that involve harm caused more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence." (§110B1).	No provision.

-14-

SubjectWhen punitive damages may be awardedWho determines the amount of punitive damagesSuppression of evidenceCollateral estoppelKasten bill

Punitive damages may be awarded if the plaintiff proves by "clear and convincing evidence" that the defendant acted with "reckless disregard." "Reckless disregard" is defined as "conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice." (§13a2).

The judge. (§13c).

"Evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible," unless it is "offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure" in a design defect case. (§14).

"A claimant may not establish any fact necessary to [prove his case] by showing that the identical issue of fact was determined adversely to the manufacturer in another action by another claimant unless both actions were based on harm caused by the same event in which two or more persons were harmed." (§4c1).

Commerce bill

Punitive damages may be awarded if the plaintiff proves by "clear and convincing evidence" that defendant acted with "reckless disregard." §120A. "Reckless disregard" is not defined.

The judge. (§120B).

"Evidence of changes in (1) a product's design, or (2) warnings or instructions concerning the product... occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design... or that a warning or instruction should have accompanied the product.... If the court finds that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available, this evidence may be admitted for other relevant purposes if confined to those purposes in a specific court instruction. Examples of 'other relevant purposes' include proving ownership or control, or impeachment." (§107A).

No provision.

Restatement

"Punitive damages may be awarded for conduct that is outrageous because of the defendant's evil nature or his reckless indifference to the rights of others." (§906(2)).

No provision.

No provision.

No provision.

THE REPORT OF THE COMMERCE DEPARTMENT'S PRODUCT LIABILITY TASK FORCE V. THE KASTEN BILL

In 1977 Victor Schwartz, then a law professor, chaired a Commerce Department Task Force on product liability which straightforwardly set out what the law is on many product liability issues.¹

On March 9, 1982 Mr. Schwartz, now a lobbyist for a coalition of business organizations called The Product Liability Alliance, told the Consumer Subcommittee that "staff draft 2 [what was to become the Kasten product liability bill] is generally in accord with general fundamental principles of product liability law."²

Apparently, Mr. Schwartz's idea of what the "general fundamental principles" of product liability law are has changed dramatically since 1977.

What follows is a comparison of what the law is according to the Schwartz Task Force with what the law would be under the Kasten bill.

What the law is according to the Schwartz Task Force

What the law would be under the Kasten bill

I. DESIGN BENEFITS

"To determine whether a product is defectively designed, the risks presented by the product must be weighed against its utility." App-689.³

Even if the product is virtually useless and extremely risky, the plaintiff cannot recover unless he can prove that "the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm" and that "a means to eliminate the danger that caused the harm was within practical technological feasibility." § 5b.

II. FAILURE TO WARN

"Courts commonly require no additional showing, either of fault, on the part of the manufacturer or of a defect in the product, in order to allow a plaintiff to recover for injuries which occurred because of the absence of a proper warning." App-694.

The plaintiff is required to show fault on the part of the manufacturer: a manufacturer is liable for failing to warn about the dangerous nature of his product only if he "knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm." § 661.

III. THE PATENT DANGER RULE

"The majority view is now that the open and obvious nature of the danger is only one factor to be considered in conducting the balancing test of defectiveness." App-691.

The manufacturer is not liable for failing to warn about "dangers that are obvious." § 6d2.

IV. LIABILITY OF MIDDLEMEN (RETAILERS-DISTRIBUTORS)

"Henningsen and Greenman were important building blocks in establishing a new cause of action in product liability cases. Under the reasoning of these decisions, the plaintiff was no longer required to prove negligence on the part of the manufacturer or seller in order to recover for injuries arising through the use of a defective product. Instead, the focus was shifted from the conduct of the manufacturer to the performance of its product. If the product proved to be defective, then the parties responsible for placing the product into the stream of commerce were liable to the plaintiff for the injuries caused by the product.

"Over time most courts extended the rationale of these cases to both retailers and distributors." App-683.

A retailer or distributor is only liable if he "fail[s] to exercise reasonable care with respect to the product." § 8a1B.

¹ Interagency Task Force on Product Liability: Final Report, U.S. Dept. of Commerce, Washington, D.C., in 5 Frumer and Friedman, *Product Liability*, Appendix G (1977).

² Hearings before the Subcommittee for Consumers on S. 2631, 97th Cong., 2d sess., Serial No. 97-109, at 12 (1982).

³ All citations are to 5 Frumer and Friedman.

What the law is according to the Schwartz Task Force

What the law would be under the Kastner bill

V. MISUSE

"The test for establishing whether a plaintiff's conduct in relation to a product should bar his recovery is whether the plaintiff's manner of use was foreseeable." App-709.

The test for establishing whether a plaintiff's conduct should bar his recovery is whether his manner of use was reasonable or intended by the manufacturer—whether or not his conduct was foreseeable.

The plaintiff's recovery can be barred "when a product is used for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user fails adequately to train another person in the safe use of the product." § 10a2.

VI. CONTRIBUTORY NEGLIGENCE

"The negligent failure to discover a defective condition or failure to use reasonable care to avert injury after such a discovery will not bar recovery." App-711.

The negligent failure to discover a defective condition and the failure to use reasonable care to avert injury after such a discovery can each bar recovery. § 10c2A can bar recovery when the plaintiff "was injured by a defective condition that would have been apparent, without inspection, to an ordinary reasonably prudent person"—in other words, where the plaintiff negligently fails to discover a defective condition. § 10c2B can bar recovery "when the claimant knew about the product's defective condition, and voluntarily used the product or voluntarily assume the risk of harm from the product"—in other words, where the plaintiff fails to use reasonable care to avert injury after discovering a defective condition.

VII. ASSUMPTION OF RISK

"The elements of the defense of assumption of risk [which can bar the plaintiff's recovery], as stated in Comment n [of § 402A of the Restatement], are knowledge of the danger or defect, and a voluntary and unreasonable encounter of it." App-705.

The plaintiff's encounter of the danger need not be unreasonable. Under § 10c2B, assumption of the risk occurs when the plaintiff "voluntarily used the product or voluntarily assumed the risk of harm from the product"—whether or not his conduct was unreasonable.

WISCONSIN TEAMSTERS JOINT COUNCIL No. 39,
March 10, 1983.

Hon. LES ASPIN,
Cannon House Office Building,
Washington, D.C.

DEAR MR. ASPIN: Wisconsin Teamsters Joint Council No. 39 is a labor organization comprised of all local unions affiliated with the International Brotherhood of Teamsters in the state of Wisconsin. Joint Council No. 39 represents approximately 35,000 members.

As President of Wisconsin Teamsters Joint Council No. 39, I wish to go on record as opposing the product liability bill introduced by Senator Robert Kasten of Wisconsin. The bill was formerly designated S. 2631 and is now designated S. 44. I understand that Senate hearings on the bill will take place on April 6 and 7, 1983.

Briefly summarized, the bill would change existing state product liability laws as follows:

1. The federal law would pre-empt all existing state law on the subject.
2. Abolish strict liability concepts in product design and product warning cases.
3. Abolish the concept of market share liability adopted in California in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980).
4. Create new and shorter time periods for bringing suits involving defective products.
5. Force each state to apply comparative negligence principles to product liability cases (regardless of the type of negligence law used in that jurisdiction).
6. Change evidentiary law in the states to increase the injured party's burden of proof under certain circumstances.
7. Reduce the damage award to which the injured party is entitled by percentages of negligence attributable to a co-employee or employer. (This means that in certain situations, a severely injured worker who is the innocent victim of a defective prod-

uct may be prohibited from any recovery at all if his co-employee and employer are found negligent.)

Product liability legislation of the type set forth in S. 44 is no stranger to the state of Wisconsin. In this state, such legislation has been drafted, financed and promoted by a coalition of insurance and manufacturing industries whose interests in product liability are completely opposite to that of the working person and consumer. Through vigorous opposition in the form of letter writing and testifying before legislative committees, organized labor and consumer groups in Wisconsin have been successful in stopping this very pernicious movement. It now appears as if the insurance and manufacturing industries have resigned themselves to failure on the state level and are attempting to attack on the national level.

Wisconsin Teamsters Joint Council No. 39 vigorously opposes S. 44. I hereby request you and authorize you to make this letter a part of the hearings record on S. 44.

Thank you for your cooperation in this matter.

Very truly yours,

GEORGE T. MUELLER, *President.*

SUPREME COURT,
STATE CAPITOL,
Des Moines, Iowa, April 19, 1983.

Senator ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee for Consumer Affairs, Senate Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: As chairman of the State-Federal Relations Committee of the Conference of Chief Justices, I write to report the action of the Conference with respect to S. 44, the Uniform Product Liability Law.

At its general business meeting in Birmingham, Alabama, on February 1, 1983, the Conference unanimously voted to oppose enactment of broad federal legislation that would codify the tort laws of the fifty states as they relate to product liability.

I have read the statements and testimony of the various witnesses who have appeared before your Committee, as well as the communications sent by the National Governors' Association and the National Conference of State Legislatures. I can add nothing that your Committee has not already seen or heard.

Comments and discussion at the Birmingham meeting disclosed that the chief justices are concerned about the invasion of the federal government into state substantive law, rules of evidence, and procedures. They see an increase of litigation as the proposed federal legislation is interpreted and applied in the fifty states, with resulting decisions as inconsistent as those of the federal circuit courts in interpreting other federal statutes. The chief justices envision multi-party litigation in which both the state and federal laws of tort reparations may apply, enhancing the risk of jury confusion. Finally, they fear that preemption of state law in the area of product liability will set a precedent for further national excursions into other fields of state law, with a concomitant diminution of that concept of federalism undergirding our constitution.

If, as the supporters of S. 44 assert, state courts have played a major role in the problems they have experienced, it would seem that those courts, under the leadership of the Conference of Chief Justices and the National Center for State Courts, should be provided support and called upon to take the lead in resolving those problems to the fullest extent possible. To my knowledge, no such suggestion has ever been advanced.

Respectfully submitted,

W. WARD REYNOLDS,
Chief Justice.

WATER & WASTEWATER EQUIPMENT
MANUFACTURERS ASSOCIATION, INC.,
Washington, D.C., May 5, 1983.

Hon. ROBERT PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR PACKWOOD: On behalf of the membership of the Water and Wastewater Equipment Manufacturers Association, Inc., a national association of major corporations that develop technology, and manufacture and supply equip-

ment, materials and services to the water and wastewater industry, I am requesting the following position be made part of the official hearing record:

WWEMA supports the "Uniform Product Liability Law" (S. 44) introduced by Senator Kasten, which will provide for uniform and reasonable national product liability standards, thus eliminating existing product liability uncertainty.

Please contact us if we can be of further assistance.

Sincerely,

JOHN M. SCHEER, *President.*

PROCTOR & SCHWARTZ, INC.,
Horsham, Pa., April 27, 1983.

HON. ROBERT W. KASTEN, Jr.,
Senate Consumer Subcommittee,
Washington, D.C.

DEAR SENATOR KASTEN: Proctor & Schwartz, Inc. and its predecessors have manufactured capital machinery for 100 years. Our two principal lines of machinery have included rotary textile machinery for the nonwoven textile industry and drying machinery for the textile, chemical and food industries.

For a substantial portion of this time, product liability was practically non-existent. It was not until the early 1970's, with the development of strict tort liability and other changes in modern case law that product liability had an impact upon Proctor. In 1975, Proctor made a decision based upon economic factors, including the mounting costs (direct and indirect) of product liability expenses, that it would no longer be economically feasible to manufacture rotary textile machinery.

Since that time, we continue to be faced with the ever increasing cost of defending these suits, some of which arise out of accidents involving machines that are more than 70 years old and others involving cases where the accident occurred on machines that were not manufactured by Proctor.

While we have successfully defended our product and continue to vigorously defend each of the lawsuits brought against us, Proctor has little or no opportunity to recover the costs incurred in defending these cases. The theory that the manufacturer can pass the costs of product liability to the consumer does not apply to Proctor because we are no longer in the rotary textile machine business. If we were to add the cost of litigation to our existing machinery line, we would become uncompetitive.

Proctor enthusiastically endorses Senate Bill 44 as it will bring uniformity to a complex and confusing body of case law. The 25 year limitation will enable capital goods manufacturers to see a finite end to their exposure so they can redirect their limited resources from defending lawsuits to the more positive pursuits of research and development and the sale of safe, reliable equipment to the American consumer.

Sincerely,

R. E. RECH, *Controller.*

JAMES HUNTER MACHINE CO., INC.,
North Adams, Mass., April 29, 1983.

HON. ROBERT W. KASTEN,
Chairman, Senate Commerce Subcommittee,
U.S. Senate, Washington, D.C.

DEAR SENATOR KASTEN: Two years ago, I left the canyons of Wall Street for the hills of the Berkshires in western Massachusetts. The chance to run a small, privately-held business of which I was part owner, and the lure of a rural environment, were ample incentive to seek my fortune in the so-called reindustrialization of America.

Although textile equipment could be correctly categorized as a "sunset" industry, I reasoned that the sun had set so long ago, it might soon be considered a "sunrise" industry. Instead of witnessing the dawning of a new era, I faced a crippling recession, high interest rates, a strong dollar and a devalued foreign currency. These obstacles, although very challenging, do not compare to the major obstacle facing our company—the present trends in product liability law.

The problem

After witnessing the legal gymnastics which our manufacturing Company has had to perform, I am not surprised at the dearth of aspiring leaders in American manu-

facturing. The problems of a manufacturer mirror those of society in the staggering number of law suits springing up everywhere. My family has been involved in the manufacturing business for 136 years. One month ago, James Hunter Machine Company, Inc. filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code, not so much because business conditions are poor, but because of a little understood, yet all too familiar concern of American manufacturers—product liability.

Under six generations of Hunters, the present company and its predecessors have been among the largest employers in the community. Western Massachusetts, classified as a depressed area, can little afford this loss of 200 skilled jobs. We filed Chapter 11 because the current status of product liability laws make it impossible to continue. After two recent court battles and a quarter of a million dollars in payments, we had the choice of fighting with lawyers the rest of our lives or filing for reorganization. At the present time, we have been named in 20 suits. A review of only those claims where a specific demand has been made (only one-half the claims) discloses product liability demands in excess of \$17 million. We know of 11 additional accidents which may result in suits, and live with the uncertainty of future accidents on which we have no control.

Manville Corporation has heightened the awareness of product liability in the country's courts yet the average citizen has little knowledge of its devastating effects until, as in our community, they witness the possible closing of a company. Product liability is the liability of a manufacturer or seller for injury to person or property resulting from defects in a product regardless of the date of manufacture or the operating conditions. Product liability is not a household word, but to most manufacturers, it is a major concern. The problem has mushroomed because of the "deep pocket" theory . . . namely, that the burden of loss should be borne by the party best able to pay. The application of this doctrine, the continuing erosion of defenses, the increasing use of punitive damage claims, the contingent fee system, increasingly liberal courts, consumerism and a society that is prone to sue . . . have all exacerbated the problem for industry. With the advent of the doctrine of strict liability in the mid-1960s and continuing changes since then, industry is confronted with a burden of unimaginable proportions.

Hunter case histories

The following are actual descriptions of suits which have been brought or are currently pending against James Hunter Machine companies.

1. In 1979, a case was settled before trial involving a piece of equipment shipped in 1920. No one could state that the machine was the original after careful inspection. There were many parts of the machine which, of necessity, had had to be replaced during the 59 years from time of its manufacture. A large sum of money was paid to the plaintiff, even though the machine had been resold three or four times. The various second- and third-hand owners had each replaced original Hunter parts with foreign parts.

2. A plant in New Hampshire has had three serious accidents in the last ten years, all resulting in product liability suits. Two were loss of hand and arm and one a death. In each case, the circumstances were similar. The mill required the employee to clean the machine from underneath while it was in operation—this in spite of the fact that they had been warned several times verbally and in writing that the proper way to clean this machine was to turn the rolls manually and never under power. Both at deposition and in trial under oath, the superintendent of the mill said that he is continuing to clean the machine under power because it can be done in minutes rather than hours. If additional accidents occur, our company will again be liable because of workmen's compensation laws.

3. In another case in Pennsylvania, peripheral guarding with interlocks was furnished. When the interlocks are disconnected, the power to the machine is turned off. At this time, it is proper to approach the machine and clean it by turning the rolls manually. In this particular case, and again in deposition and testimony, it was admitted the operator entered the enclosure, had a fellow worker take the key and lock him in so that the power was on. In spite of his testimony of complete negligence, he was awarded a high six-figure settlement.

4. In California, there are several suits pending, one of which involves an accident on a machine which the plant made up from several old machines they had in their warehouse. Unfortunately, the frame of the equipment which carried all of the working parts had a Hunter nameplate on it and an order number. However, this order number bore no relationship to the machine which was constructed by the mill and a sheet metal company they hired to provide special ductwork. Our company had no record whatsoever of what had been done nor had we ever manufactured a machine with the configurations of the one on which the man was injured.

Hunter companies have always tried to produce machinery meeting the design standard of the time—from 1847 to 1983. Unfortunately, as in the example above, we face suits on equipment built over fifty years ago. Of the twenty suits currently pending against the company, only three involve machines shipped in the last ten years, while 11 involve machines shipped prior to 1960, over 23 years ago.

What caused the decline in the number of suits of machinery built in the last ten years? First, the machines we have designed and manufactured have been reviewed by our Safety Committee. There is no question our new equipment is the safest we have ever built. Other firms similar to Hunter have devoted much time and expense to taking a fresh look at their equipment from a safety point of view. Second we have attempted to contact every known owner of Hunter equipment to offer retrofits, warning signs and maintenance and safety manuals. As a practical matter, we do not know where all our machines are located because they change hands, nor is it incumbent on the owner to inform us of his disposition of assets. Also, we cannot force a customer to retrofit his equipment with our updated safety features; yet, under most jurisdictions, we are still held liable. Third, our salesmen, engineers and technicians, when visiting customers' installations, are trained to report potential safety hazards to the customer and to Hunter management.

Regarding the majority of the pending suits on equipment shipped prior to 1960, there is very little we can do other than try to defend ourselves. In all probability, the older machines have been retrofitted with non-Hunter parts, resold, or disassembled and sold off as parts in the used market. Because of alterations, possible resale or even obsolescence, we favor a 10-year time limitation with respect to design defect and inadequate warning claims involving capital goods. Hunter Machine lives under a law which would be analogous to holding automobile companies liable for damages to persons injured in a 20-year-old car which was not equipped with seat belts. It is unfair to judge yesterday's equipment by today's standards. The laws of the various states are unfairly penalizing companies which have proven their utility over the decades.

Financial burden of product liability

The cost of product liability has escalated in recent years. To give you an idea of the burden it has placed on a small manufacturer, product liability costs equal 4.2 percent of new equipment sales. The cost includes payroll, travel, insurance and legal; but it does not include any settlements. For fiscal year ending in September 1982, the above product liability costs roughly equal the salary of our four officers and the department heads of Sales, Engineering and Manufacturing.

Some lawyers have made product liability a jackpot for billings; and, in many cases, the lawyers receive more money than the victims. For instance, a couple of months ago, we settled two suits in the state of New Jersey. One claimant (injured party) was paid \$2,500 while the other received zero. Our legal bill came to \$21,291, a sum which is greater than eight times the settlement. In December, we settled a case for \$175,000 and our legal bill came to \$115,000.

Our experience at Hunter clearly points out that the cost of vindicating our rights is substantial and unreasonable. My viewpoint is underscored by the president of Harvard University, Derek C. Bok, in his recent annual report to the Board of Overseers of Harvard College where he attacked the American legal system as "too complicated to understand, too quixotic to command respect and too expensive to be of much practical use". I feel the prevailing party, either the plaintiff or defendant, ought to be able to recover reasonable costs, including attorney fees.

Last year was a difficult one; our company lost nearly one-half million dollars from operations. New capital is required; but, given all the uncertainty caused by product liability, there is no incentive for the family to inject new funds into the company. Neither will our banks nor other lenders take a risk to preserve the company, knowing full well we could be wiped out at any time.

Trying to secure product liability insurance at a reasonable cost was a further challenge which has been a financial burden. The company could not afford to purchase insurance between 1977 and 1981 and, therefore, went self-insured. Today, we are again uninsured because the cost of insurance and the protection are unaffordable. For example, in early April, we received a quote for products liability insurance with a \$500,000 single limit at a premium cost of \$185,000 with a \$25,000 deductible per occurrence. This insurance does not protect us from a "disaster settlement"; and, given the potential for a large award, we are better off investing the \$185,000 ourselves. All we would be doing is trading dollars with the insurance company since a payout by the carrier may not take place for ten years.

Another problem which adds to the cost is the law governing product liability is left up to the individual states and, hence, there are 50 different interpretations.

This entrangled mishmash of regulations bewilders a manufacturer who ships machines all over the country and it requires time for management to prepare a defense among the various jurisdictions.

Uniform standards are needed

As I understand, although I am not a lawyer, you have introduced S. 44, the proposed "Product Liability Act" which would replace various state standards for judging products liability cases with uniform federal standards. The bill attempts to restore balance by clearly defining for manufacturing its duties in meaningful and realistically achievable terms. The bill calls for clear uniform standards that require consideration of practical technical feasibility at the time of manufacture, provide clear guidelines on warning methods and recognize legitimate and necessary relationships among cost, feasibility, useful life, alteration, foreseeability of use and misuse. As a small manufacturer besieged with product liability suits which threaten our reorganization efforts, we whole heartedly endorse S. 44. We only regret that the statute of repose comes into effect only after 25 years.

Unfortunately, the American Bar Association (ABA) has voted to oppose this legislation. This is not surprising, since lawyers have the most to lose by it. Some lawyers contends the bill would hurt consumers but a good deal of self-interest can be detected thru this smoke-screen of piety.

Product liability may be too important to the average citizen to leave to the lawyers to settle. It cite an example of the unreaoanble and naive rhetoric surrounding the issue, The New York Times (2/10/83) quotes New Hampshire lawyer Stanley Browne in an address to the ABA voting body as saying, "what they (manufacturers) are asking for is to set a standard and be able for 50 years not to improve their products." Any manufacturer or service-oriented business knows the marketplace is constantly changing. What machinery company in this age of advancing technology could even consider not improving a product for 50 years and hope to stay alive? Hunter was supplying machinery to the woolen industry to New England during the first half of this century; but, as the marketplace demanded synethetics, we introduced new machinery for the nonwoven industry.

Summary and recommendations

Who benefits by the potential dissolution of the Hunter Machine Company? Certainly not the employees, customers, the local merchants, the economy or the United States. At one time, there were three major U.S. suppliers of the textile equipment in our market, Proctor & Schwartz (Philadelphia), Davis & Furber (North Andover, Massachusetts) and Hunter. Our U.S. competitors have dropped out of the market because of their enormous product liability exposure. Proctor & Schwartz, a subsidiary of SCM Corporation, has ceased production of equipment, while Davis & Furber is being dissolved. The only companies that will now supply the type of equipment we manufacture are located in Europe and Japan. However, there is a very active second-hand market in this type of equipment which means that James Hunter is still liable for second, third and, in some cases, fourth owner and location. Because the textile industry supplies goods to our Armed Forces, it may not be in the national interest to be forced out of business by unjust product liability laws.

I returned to the family company with the hope of introducing new products and expanding into new markets. Instead, I had to devote my time to "paper entrepreneurialism" whereby I spent inordinant amounts of time defending our company from product liability suits.

Over the past year, there have been a number of articles and books published on the new economic trends transforming our lives. One such trend is the switch from a manufacturing economy to a service economy. After struggling to keep a manufacturing business afloat amidst product liability claims, I can well understand the allure of the banking or legal professions. No wonder the idea of working with industrial production problems is alien to many young professionals.

Businessmen, educators and government leaders are calling for a revival of the economic engine which will restore prosperity and opportunities for our citizens. Although high-tech will help us in the decade ahead, it probably will not even replace the manufacturing jobs lost over the past few years. Therefore, the manufacturing sector must play the key role in this revival. If our country's success and perhaps national security depends upon a strong economy and the manufacturing sector is required to be a significant contributor, it is imperative the laws of the land support, rather than hinder, this goal. In order to attract talent and investment to manufacturing, uniform product liability legislation must be enacted.

What is the answer? My recommendation is twofold:

1. That Congress pass the Products Liability Act with a ten-year statute of repose limitation on liability.

2. That the loser party pays the court costs for both sides, including attorney's fees.

Because the total demands of the suits we face are in excess of four to six times the total assets of the company and the litigation remains so uncertain given the confusing legal interpretations in 50 states, is it any wonder we have sought court protection? I liken the Hunter situation to the game of Russian Roulette with two exceptions: first, Hunter is the only player and, second, we have to pull the trigger six times in succession.

As I was about to mail this letter, the attached editorial in the most recent copy of America's Textiles arrived. This editorial corroborates the problems outlined in this letter and perhaps the product liability problem will receive the national attention it deserves.

Sincerely,

DURANT A. HUNTER, *Vice President.*

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW
Washington, D.C., May 9, 1983.

HON. ROBERT KASTEN, Jr.,

Chairman, Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Although we did not request time to testify during the hearings of your Subcommittee on S. 44, the proposed Product Liability Act, we want you to know of our strong opposition to this legislation. The UAW considers it to be contrary to the interests of consumers generally and particularly working Americans who constitute the largest group which must rely on liability laws for protection. The bill may be in the interest of manufacturers but, in our judgment, it would jeopardize protections needed by consumers and workers.

S. 44 would preempt state product liability laws and substitute generally weaker standards—in some cases, substantially weaker standards—and in the process weaken protections afforded workers and consumers against manufacturers of dangerous products.

Manufacturers should be liable for damages caused by their products whether they are negligent or not. It is the effect that is important in such a case, not whether the manufacturer is negligent. The scope of liability should not be limited by definition nor by duration, especially at a time when we are discovering that injury may not manifest itself for long periods of time.

S. 44, in the name of creating uniformity among the states, would weaken consumer and worker protection. The UAW opposes the bill, and we urge you do to so as well.

We would appreciate it if this communication could be made a part of your hearing record on this legislation. Your consideration of the UAW position on this measure will be appreciated.

Sincerely,

DICK WARDEN, *Legislative Director.*

STATEMENT OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.¹

INTRODUCTION

SPI supports the concept of a federal product liability act, and commends this Committee for its efforts in developing S. 44. SPI has long been concerned about the

¹ The Society of the Plastics Industry, Inc. is a corporation organized under the Not-For-Profit Corporation law of the State of New York. It is composed of approximately 1,200 member companies and individuals who supply raw materials; process or manufacture plastics or plastics products; engineer or construct molds or similar accessory equipment for the plastics industry; and engage in the manufacture of machinery used to make plastics products or materials of all types. SPI is the major national trade association for the plastics industry, its membership being responsible for an estimated 75% of the total dollar volume of sale of plastics in this country. As spokesman for the plastics industry in the United States, SPI has on frequent occasions appeared before various federal legislative and administrative bodies regarding matters of importance to the industry. Further information regarding SPI is available on request.

chaotic state of tort law in the United States. Causes of action, standards of conduct, and available defenses vary from state to state, making it almost impossible for manufacturers, despite their best efforts, to comply with every standard in every state in which they do business. As a result, both small and large businesses are unable to calculate potential liability exposure and to effectively plan to insure against it. Indeed some businesses are unable to obtain insurance at any price.

These factors have led to a crisis in products liability law. While SPI has been involved in product liability reform efforts at the state level intended to bring some measure of uniformity to product liability law, these efforts, for the most part, have not succeeded. As a result, SPI supports a federal product liability act which would preempt state law.

Although product liability law is an area traditionally dealt with at the state level, SPI believes that the realities of the modern marketplace demand a uniform federal law in this area. The Product Liability Act will continue, for the most part, to be administered by state courts, and will require neither the expenditure of federal funds nor the creation of a new federal office. Thus, while SPI agrees on the need to limit federal intervention, it believes that in the product liability area a federal law will provide the only effective way to address current problems.

A federal Product Liability Act should be premised on a fault-based standard of liability. A fault-based standard of liability promotes both individual responsibility and general safety since it requires those whose faulty conduct caused another's harm to bear the risk of loss associated with such wrongful conduct. The fault standard of reasonable care is easily understood, readily applied, and generally meets the expectations of society as to the steps individuals in society will take to avoid harming others. Thus, SPI believes that a return to a fault standard in products liability cases should be the cornerstone of federal tort reform efforts.

Specific Comments on S. 44 follow.

PREEMPTION

SPI agrees that a federal Product Liability Act is necessary in order to assure increased uniformity in tort law nationwide. Increasing societal mobility, expanding markets in interstate commerce, growing reliance on national standards, and the development of insurance rates based on national averages are only some of the factors underscoring the need for a federal product liability law. Federal law should govern all actions brought against a manufacturer or product seller for harm caused by a product.

RESPONSIBILITY OF MANUFACTURERS

SPI agrees that a claimant should be required to prove each and every element of liability in a product liability action by a preponderance of the evidence. In this regard, SPI believes that the Product Liability act should specifically require dismissal of cases where a claimant fails to introduce sound objective evidence as to whether the unreasonably dangerous aspect of a product proximately caused his harm.

PRODUCT DESIGN AND CONSTRUCTION

Consistent with its belief that the reasonable care standard is the appropriate measure of liability in products cases, SPI supports the return to a fault-based standard of liability in design defect cases. SPI believes that manufacturers should not be liable for design defects unless they knew or should have known of the existence of a danger, and a means to eliminate that danger was within practical technological feasibility. Requiring a manufacturer to use reasonable care in designing products will, SPI believes, encourage safety by providing manufacturers with an incentive to design safer products.

SPI believes that a manufacturer or product seller who has made the product as safely as practicable given the technical, mechanical and scientific knowledge relating to product safety that was reasonably feasible for use at the time of manufacture should be absolved of liability in the event of injury involving such product. So long as a manufacturer or product seller has followed these "state of the art" requirements, it is evident that such party has used all due care with respect to the product and those using the product. This is the most that a user or consumer of the item has a right to expect. Any other standard allows claimants and their experts to simply second-guess the scientific, technological and management decisions of the manufacturer.

SPI opposes retention of strict liability for construction defects. Strict liability requires a party to bear the costs of an accident or injury without regard to fault; indeed, strict liability has frequently been imposed on manufacturers and product sellers who were as careful as possible in making a product. Since strict liability does not punish wrongful conduct, it follows that imposition of strict liability does not promote safety. Strict liability thus fails to fulfill the deterrent function of tort law. Instead, application of strict liability has simply raised litigation costs, increased insurance rates, and forced manufacturers and product sellers who have taken all reasonable precautions with regard to their products to become virtual insurers of their products.

It is SPI's view that manufacturers should only be held liable when they fail to use due care in the manufacturing process. Claimants should be required to provide that a construction defect causing injury was the result of a manufacturer's breach of a duty of care.

PRODUCT WARNINGS OR INSTRUCTIONS

Imposition of strict liability for failure to warn is becoming an increasingly serious problem in the plastics industry. Manufacturers of chemicals or raw materials used in making plastics products have been held subject to liability when the finished product fails to contain warnings, even though warnings or instructions were given to their purchaser. Manufacturers of machinery used in plastics processing plants face liability when a workplace injury occurs, even though warnings or instructions were provided to such manufacturer's immediate buyer. Despite their own use of reasonable care, then, these manufacturers incur insurance and litigation costs stemming from another party's lack of care. SPI therefore agrees that a manufacturer's duty to warn should be based on a fault standard. SPI thus supports Section 6, which requires a claimant to establish that the manufacturer failed to use reasonable care in that (1) the manufacturer knew or should have known about the danger allegedly causing the harm, (2) failed to provide warnings, and (3) warnings, if provided, would have prevented a reasonably prudent product user from being harmed. SPI concurs that the manufacturer's duty to warn in this regard should be evaluated at the time the product was sold.

SPI believes that a product should not be considered unreasonably dangerous for lack of warning if warnings were provided to a person who could reasonably be expected to be in a position to take action to avoid the harm; manufacturers should not be required to inquire whether warnings are being passed on to others. In SPI's view, a conclusive presumption that the manufacturer has fulfilled its duty to warn should exist whenever the manufacturer provides warnings or instructions to an employer or to supervising experts. SPI also agrees that manufacturers of component products fulfill their obligation to warn by providing warnings or instructions to their immediate buyer; manufacturers of the finished product must provide any necessary warnings regarding the product's use.

Finally, in any instance where it is not possible to warn the ultimate user or other parties who may be injured by a product, warnings provided to the manufacturer's immediate buyer should be deemed to satisfy the duty to warn. In short, where a manufacturer has provided its buyer with appropriate warnings, the manufacturer should not be penalized for the buyer's failure to pass on warnings or instructions since the manufacturer has no control over the buyer's actions.

RESPONSIBILITY OF PRODUCT SELLERS

SPI supports a return to a fault-based standard of care for non-manufacturer product sellers. Only where a product seller has failed to exercise reasonable care with respect to the product, and where that failure causes injury, should the product seller be held liable. Liability may also appropriately be imposed upon a product seller who makes an express warranty independent of any express warranty made by a manufacturer about a material fact relating to the safe performance of the product which proves to be untrue, and the failure of which causes harm. Of course, a product seller who simply repeats or affirms an express warranty made by a manufacturer should not face liability; any other rule would force product sellers to independently test a manufacturer's product to verify the veracity of express warranties.

SPI disagrees, however, that non-manufacturer product sellers who have all due care in handling a product should be held liable for harms attributable to a manufacturer simply because the manufacturer is not subject to service of process or is judgment proof. This provision is totally contrary to a fault-based system and should be stricken from S. 44.

COMPARATIVE RESPONSIBILITY

SPI supports adoption of comparative responsibility principles since they are consistent with the concept of fault-based liability. Comparative responsibility promotes individual accountability and safer use of products by requiring claimants to bear the risk of loss of their own faulty conduct. Comparative responsibility allows claimants to be compensated only for that portion of their injury attributable to the fault of the manufacturer; any amount attributable to the claimant's own fault should not be recovered. SPI does not believe, however, that a claimant should be allowed to collect any uncollectable amount of a judgment from other parties allocated responsibility in the action; this concept is inconsistent with comparative liability principles.

ALTERATION AND MISUSE OF PRODUCTS

In keeping with its philosophy that the federal Product Liability Act should premise liability on fault, SPI advocates elimination of manufacturer or product seller liability where an injury occurs because the product was modified, misused, or improperly maintained. It is unfair to require manufacturers and product sellers to compensate persons injured while using a product when the injury is caused by the fault of the user or a third party. Those whose acts have caused injury through the failure to use due care or failure to follow applicable standards, instructions, codes or regulations should bear an appropriate portion of the risk of loss when injury or accident occurs. Where a product user misuses or alters a product, damages should be reduced or eliminated to the extent that the misuse or alteration caused the claimant's harm. Where misuse or alteration is not in accordance with warnings or instructions, the manufacturer should be completely absolved of liability since he has taken all reasonable steps to prevent the harm which occurred.

EFFECT OF WORKER COMPENSATION BENEFITS

SPI strongly supports the denial of subrogation and the reduction of damages in third party suits equal to the value of an employee's worker compensation benefits as provided by this section. SPI also supports the provision which prevents a person entitled to file a claim for worker's compensation benefits from filing a product liability action against a present or former employer for harm caused by a product. This would serve to eliminate alternative or dual recovery which is becoming an increasingly serious problem.

TIME LIMITATION ON LIABILITY

SPI agrees that a specific statute of repose is vital to avoid open-ended manufacturer liability, but urges the Committee to adopt a ten year statute of repose in lieu of the twenty-five year provision found in Section 12. SPI believes that a product defect, if one exists, will manifest itself within ten years. After that time, the user is in the best position to know and understand the risks associated with the operation of the product, particularly with regard to capital equipment, and to take remedial action. Over time, it becomes increasingly difficult for manufacturers to defend against allegations of product defects as witnesses move, disappear or die, businesses change hands, and records are lost or destroyed. Finally, it is impossible to insure against open-ended liability; a ten year cut-off of liability permits manufacturers and insurers alike to obtain and provide adequate insurance on an actuarially sound basis. For these reasons, SPI believes that ten years should be adopted as the maximum useful safe life for any product.

PUNITIVE DAMAGES

Recovery of punitive damages in products cases should be specifically precluded. Punitive damages are inconsistent with the philosophy of tort law, which is to make whole those injured as a result of a party's fault. No further deterrent to wrongful conduct is required apart from this compensatory sanction.

OTHER ISSUES

Other concerns SPI believes should be addressed in a federal product liability act are discussed below.

1. Industry wide liability

SPI believes that S. 44 should be amended to specifically prohibit industry-wide causes of action. Industry-wide causes of action, such as concept of action, market

share or enterprise liability, allow a claimant to maintain an action against one or more industry defendants, even though the claimant is unable to identify the manufacturer of the product allegedly causing the harm. Further, under such theories a plaintiff may recover damages for injuries associated with the use of some product not only against a defendant which actually manufactured the product but also against all others engaged in the industry. Industry-wide liability theories then force industry members to not only become insurers of their own products, but to insure the products and activities of every other industry member as well.

These theories are not consistent with the requirement that a claimant plead and prove that a particular named defendant was responsible for the harm. Like strict liability, these theories bear no relationship to fault. Industry-wide liability theories simply remove the underpinnings of plaintiff's burden of proof, allowing, if accepted, a plaintiff to recover against an entire industry on simple allegations of injury linked to a particular product.

While most courts entertaining industry-wide theories have rejected them, SPI believes it is critical that the Product Liability Act specifically preclude such causes of action. Such theories undermine business planning, they do nothing to promote safety, and they are clearly inconsistent with our system of free enterprise and individual accountability.

2. Compliance with standards

SPI is concerned over the failure of S. 44 to provide that compliance with standards or contract specifications is a defense in products liability actions. Compliance with government or voluntary consensus standards, including state and local building codes, should be a defense in products liability actions. Such standards are developed using input from manufacturers, government officials, consumers and other interested parties. Thus, a decision on safety represents a consensus among the interests of all relevant parties. Generally, the standards are periodically updated, and reflect scientific and technological information available, as well as practical technological feasibility. Since these are the considerations which demonstrate whether a manufacturer or product seller has used reasonable care, compliance with such standards should be a defense.

Many plastics products, for example, are used in the building construction industry. Specific use and installation instructions for such products are often found in building codes. Yet manufacturers of the chemicals and other raw materials used to make plastics construction products and the manufacturers of the finished construction product have been involved in tort suits even though products were installed in violation of the building code. This is not the fault of the manufacturer. There is no feasible way to warn ultimate occupants of buildings about hazards which might exist with regard to specific products resulting from building code violations. If a product is accepted for use under a building code provision but has been installed in violation of a code, the manufacturers should be completely absolved of liability for any injury involving the product. Claimants have an appropriate remedy against the installers in such situations.

Products built to federal contract specifications should be conclusively presumed safe. In such event, it is unfair to penalize a manufacturer for fulfilling a contract obligation. Where the government standard or specification is inadequate, an appropriate remedy may be sought against the government through the Federal Tort Claims Act.

3. Sanctions for filing frivolous lawsuits

In SPI's view, the appropriate framework for a Federal Product Liability Act should be fault. Manufacturers and product sellers should be required to meet appropriate standards of reasonable care in manufacturing and selling products. When they fail to meet such standards, they should be required to compensate those injured as a result of their failure to use due care. In such a way, manufacturers and product sellers will be able to follow appropriate procedures to prevent accidents, and to plan for product liability insurance needs. Plaintiffs who file frivolous lawsuits upset this delicate balance, requiring manufacturers or product sellers to absorb greater litigation costs and, perhaps, to settle unmeritorious suits simply to avoid further litigation costs. Such settlements often encourage other plaintiffs to file similar suits, equally without merit, in the hopes of gaining settlements.

Such unfounded suits needlessly waste judicial time, unduly burden defendants, and force legal fees and insurance rates to go up; they must be discouraged. SPI believes that sanctions should be imposed against plaintiffs who file frivolous lawsuits; defense costs and attorneys fees should be assessed against such plaintiff. Such sanctions will deter claimants from saddling our judicial system with unmeri-

torious suits in an attempt to win unwarranted settlements from a manufacturer or product seller.

CONCLUSION

SPI believes that a federal product liability law will assist manufacturers and sellers in business planning; prevent some "nuisance" suits; prevent "forum-shopping"; and generally increase litigation certainty for all parties involved. In its Comments herein, and in Comments filed with regard to S. 44's predecessor, S. 2631, SPI has attempted to outline a framework for a federal product liability act. Subject to such Comments, SPI supports S. 44, the Product Liability Act, as a means of providing a more balanced, equitable way of apportioning liability, which, because it returns to the more readily understandable concept of fault as a means of imposing liability, will encourage both individual responsibility and product safety.

NATIONAL FOOD PROCESSORS ASSOCIATION,
LEGISLATIVE AFFAIRS DIVISION,
Washington, D.C., May 31, 1983.

Hon. ROBERT W. KASTEN,
Chairman, Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The National Food Processors Association (NFPA) is a scientifically and technically based trade association that represents about 600 member companies that pack processed-prepared fruits, vegetables, meats, fish and specialty products, including canned, frozen, dehydrated, pickled and other preserved food items. The Association has represented its food processing member companies on a broad range of food regulatory matters since its founding as the National Canners Association in 1907.

NFPA endorses in broad outline S. 44 and similar legislation intended to establish a nationwide product liability standard. We believe that the uniformity and greater certainty of outcome this legislation would provide in the area of consumer claims and litigation would benefit the food processing industry.

NFPA favorably notes the following features of S. 44:

S. 44 states that if a defect was not scientifically discoverable at the date of manufacture, a defendant will not be liable for harm caused by it. This counters a trend in state courts toward rejecting state-of-the-art defenses.

S. 44 would allow evidence of postmanufacturing improvements only for impeaching defense testimony denying the feasibility of precautionary measures. This is in contrast to the court decisions and procedural rules of nine states and one federal appellate court allowing such evidence to prove a defect.

S. 44 would make judges responsible for determining the amount of punitive damages to be awarded when juries decide such damages are warranted.

Accordingly, NFPA advocates enactment of a federal product liability statute. I ask that this letter be made a part of the printed hearings on S. 44.

Sincerely,

RICHARD W. MURPHY,
Vice President/Director.

THE UNIVERSITY OF MICHIGAN—MEDICAL SCHOOL,
DEPARTMENT OF PATHOLOGY,
Ann Arbor, Mich., June 16, 1983.

ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: Thank you for your letter of June 10 concerning the Product Liability Act (S. 44). I had requested on two previous occasions, first to you in my letter of March 18 and again to Senator Riegle in my letter of April 12, for an opportunity to testify during the hearings on S. 44. I appreciate the difficulty you are having in accommodating all of the requests to testify and your solicitation of written statements in lieu of personal testimony; however, the nature of my testimony does not lend itself well to a written statement. I utilize photographic slides in demonstrating specific cases where products were alleged to be defective resulting in serious or fatal injury to persons. I would like to present material much in the same manner as I do when lecturing to medical students or postgraduate physi-

cians. The information simply loses much of its impact when it must be reduced to a written statement. I have been involved with teaching at the University level for nearly a quarter of a century and am convinced that lecturing with visual aids is a very effective modality of instruction.

I respectfully request that this letter be made a part of the record of the hearings on S. 44.

Sincerely,

PAUL W. GIKAS, M.D.,
Professor of Pathology.

LAW OFFICES,
COLSON HICKS & EIDSON,
Miami, Fla., June 20, 1983.

Senator ROBERT KASTEN,
Senate Commerce Committee,
U.S. Congress, Washington, D.C.

DEAR SENATOR KASTEN: I understand that you are reluctant to accede to Senator Hollins' request for an additional day or two of hearings on the Uniform Product Liability Legislation.

As you know, your proposal would constitute one of the most radical federal pre-emptions of state law in this century. It would seem advisable to have more than the two days of hearings which you conducted in April and to invite as witnesses people who, through their previous experience or through their tragic mistreatment by hazardous products, can contribute to a broader foundation for the Committee.

As one who observed the position of both the Reagan administration and the Republican party on matters relating to state's rights, it is deplorable to see the rights that injured people in my state have secured over many years of judicial deliberation cut back by your proposed legislation. After all, given the recent disclosure of a widening array of toxic chemicals and hazardous products, the right of injured people should be strengthened by the common law and not limited by rigid federal code.

I ask that you reconsider requests by your colleagues to schedule further days of hearings. Would you kindly include this letter in the printed hearing record volume.

Very truly yours,

WILLIAM M. HICKS.
SOLBERG, STEANS, SCHOFIELD & HIGLEY,
ATTORNEYS AT LAW,
Menomonie, Wis., June 21, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: I am a country trial lawyer practicing in Northwestern Wisconsin. I serve as a member of the Board of Directors of the Wisconsin Academy of Trial Lawyers. I have been certified as a Civil Trial Advocate by the National Board of Trial Advocacy.

I write to express my strong opposition to Senate Bill No. S. 44 which bears your name.

Your bill is counterproductive to the establishment of consumer safety. Your bill is counterproductive to our nation's need to reduce federal bureaucracy. Your bill hurts my clients, the "little" people, who are injured by shoddy and defective consumer products, i.e., a small girl whose foot is amputated in a lawn mower; a small boy who loses his fingers in his father's milk pump equipment; the farmer whose hand is mangled in unsafe farm equipment.

Furthermore, I understand that, despite requests for a more extended hearing, the hearing time for this legislation has been limited to ten days. Legislation such as S. 44 which will so substantially affect the rights of injured victims must not be considered without permitting all opponents to be heard.

I hope that my letter will cause a change in your position. I understand, however, that it probably will not.

At the very least, I implore you to allocate the additional two days that have been requested for the presentation of opposing viewpoints.

I ask that this letter be included as a part of the printed record of this hearing.
Thank you for considering this request.

Very truly yours,

PHILLIP M. STEANS.

THRASHER, DOYLE & PELISH, LTD.,
Rice Lake, Wis., June 21, 1983.

HON. ROBERT W. KASTEN, Jr.,
Senate Office Building,
Washington, D.C.

It has come to my attention that this matter is up for hearing, and that the hearing may be somewhat abbreviated under the circumstances. I would like to briefly state some concerns that I have with the bill, and further urge that in view of the potential impact of this bill on worker and consumer safety and American jurisprudence that hearings be of sufficient duration that all viewpoints can be fully expressed and considered.

Unlike some of my colleagues, I am not wholly unsympathetic to the defense viewpoint as regards some aspects of current product liability law. I do believe, however, that by and large the judicial system does render invaluable service in non-bureaucratic regulation of product safety.

You, at least, have heard most of the pros and cons concerning specific provisions of the bill anyway. I would like to address something that does not seem to receive as much consideration, and that is the nationalization of this one aspect of tort law. The entire concept of the federal system has been to allow the states considerable latitude in the development of common law, including all aspects of tort law save railroad worker injuries and maritime injuries, and as to the latter an injured party still has the option of invoking state common law. A national products liability bill is in my judgment a wholly new concept, which should be debated as such. Never mind the subject of the regulation or even the merits of the proposed details; I believe that the whole notion of federal tort legislation should be thoroughly examined before undertaking such a quantum leap of federal intrusion into traditional areas of state regulation. Perhaps the time has come to make tort rules more nationalized—although I am not myself convinced of that—but in all events it must be understood that this bill is indeed a first step toward exactly that.

It is true, of course, that there are many uniform acts in effect throughout the nation. The Uniform Commercial Code is by far the most familiar, but there are many others; a brief count would indicate not less than 48 in effect in the State of Wisconsin. But the important point to remember, Senator, is that these uniform acts were voluntarily enacted by the legislatures of all states which adopted them; none were imposed by the federal government. That is the way the Framers intended it to be, and if increasing population and mobility and changing social conditions indicate a change, may I suggest that the concept itself be examined and examined carefully. I am concerned that passage of your product liability bill, irrespective of the merits, will have the effect of subtly introducing the idea of federal tort legislation with woefully inadequate consideration being given to the ultimate effect that this might have.

While we can all point to individual cases which may have produced seemingly unjust and unreasonable results, these are of course the "attention getters." By and large, the judicial system works pretty well in reasonably steeling disputes regarding personal injury. No matter what impression one might get from the press the consumer who was injured solely because he or she acted like an absolute idiot usually does not win. And it seems to me that the common law system has done a pretty good job in keeping up with changing technology. It provides its own system of regulation which, if not completely uniform from jurisdiction to jurisdiction, nevertheless tends to produce pretty similar results over a period of time. And, as I mentioned earlier in this letter, it is basically a non-bureaucratic system of regulation. That, it seems to me, is no small matter.

Accordingly, I would urge that far more public attention be given this bill, not only as to its own merits, but to the underlying concept of federal tort legislation in general. I would appreciate it if this letter could be included in the printed record of the hearing. Thank you.

JOE THRASHER.

TECHMEIER, SHERDY & ASSOCIATES,
Milwaukee, Wis., July 8, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Hart Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: Thank you for replying to my letter to you relative to the proposed Product Liability Act, Senate Bill number 44.

I note that you have invited me to submit a written statement containing my substantive comments for the record on the specific merits of S. 44. Perhaps I did not make myself clear in my past correspondence. My objection is not to the present proposed form of S. 44, but rather, to the concept of federally legislated products liability law in any form at this time.

It is my belief that the interest of our society will best be served if product liability law continues to develop within the common law system rather than through federal legislation. While the roots of product liability law stem from *MacPherson v. Buick Motor Company*, 271 N.Y. 382, 111 N.E. 1050 (1916), it was not until *Henningesen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960) that the noted fall of the citadel of privity of contract and the true development of modern product liability law began. Only in the last 23 years has this area of the law been evolving and being fleshed out. I am aware that since there are 50 common law jurisdictions in the United States that manufacturers feel they bear an impossible burden of keeping apprised of and meeting the various legal requirements of each separate jurisdiction. However, in the vast majority of the states the development of product liability law is embryonic and when these state's appellate courts do address issues of first impression in this area they generally adopt the rules of the more progressive states where the law is significantly developed such as New York, New Jersey, Wisconsin and California. Nevertheless, even in these progressive states the law is not so developed so as to be capable of rational codification.

I firmly believe that product liability law must be permitted to mature within the established common law system rather than being artificially and prematurely produced in the laboratory of state or federal legislative committee hearings. The importance of the proper development of this area of the law to our ever more so technical and industrial society is not out weighed by a perceived hardship manufacturers of products have concerning multiplicity of jurisdiction. The injected premature growth of the law embodied in S. 44 will result in uncertainty and miscarriages of justice for consumers and manufacturers alike.

The time constraints of my practice and other obligations make it impossible for me to submit a more lengthy statement of my objection to S. 44. Nevertheless, I would appreciate it if you would see to it that this letter is included in the printed record of the hearing before your subcommittee.

Thank you for your consideration of my comments. I am sure that after careful study and reflection you will take the prudent course and reconsider your support of S. 44.

Very truly yours,

DANIEL R. MCCORMICK.

GOLDBERG, PREVIAIT, UELMEN,
GRATZ, MILLER & BRUGGEMAN, S.C.,
Milwaukee, Wis., July 12, 1983.

Hon. ROBERT W. KASTEN, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: Thank you for your letter of July 1, 1983, requesting written comments relative to Senate Bill No. 44 also known as the Product Liability Act. I request that my comments here-in be made a part of the printed record of the hearing on the Act.

Your letter of July 1, 1983, indicates:

"Every attempt was made to ensure that witness panels included representatives from the consumer, business, and legal communities. . . . In its present form, S. 44 reflects recommendations from consumer organizations, business groups, legal scholars, Administration officials and Committee members."

I have been informed that the Wisconsin Joint Council of Teamsters No. 89, representing 35,000 union workers in the State of Wisconsin, and the Wisconsin State AFL-CIO, representing 370,000 union members in the State of Wisconsin, have writ-

ten to you expressing opposition to the Act. Yet, your letter is silent as to input from labor unions.

I think it is extremely important that the record reflect that the majority of Wisconsin laboring people are opposed to the Act. It is also important that the record reflect the fact that Wisconsin labor has attempted to articulate such opposition in person at the hearings on the Act, but has been prohibited from doing so by those in charge of the hearings.

The United States system of tort reparations has traditionally been within the purview of the courts of the various States. Most of the law relative to products liability has evolved by the common law on a State-by-State basis depending upon the needs of each individual State. Passage of the Act would completely and unpredictably alter tested existing State law.

The Product Liability Act would substantially alter tested existing Wisconsin law. The following constitute the primary objectionable aspects:

1. Section 4(a) changes the evidentiary law to increase the injured party's burden of proof in product liability cases. This will have the effect of making it more difficult for injured people to successfully prosecute a claim.

2. Section 5(b)(1) states that a product is not unreasonably dangerous in design or formulation unless the manufacturer knew or should have known of the danger. Under existing law, one need not prove knowledge of a defect. Under the proposed law, a plaintiff would have to prove negligence on the part of the manufacturer resulting in a situation in which it would be extremely difficult to prove a claim based on a latent defect.

3. Section 6 eliminates traditional strict liability concept in claims alleging failure to warn. Such an erosion of strict liability concepts would unreasonably limit the right of an injured person to a claim for relief on a failure to warn theory.

4. Section 8 requires proof of negligence on the part of a wholesaler or retailer, or a breach of an express warranty, unless the manufacturer is judgment-proof, or outside the jurisdiction of the forum. Existing law provides for strict liability among all interim sellers. Although this section treats the seller as a manufacturer in cases in which the manufacturer is judgment-proof or outside the jurisdiction of the forum, it does provide another hurdle to an injured person.

5. Section 11 eliminates the right of a workers' compensation insurance carrier to recover benefits from a tortfeasor and, instead, permits the tortfeasor to reduce its liability by the amount of compensation payable by the worker's compensation insurance carrier. In effect, this permits the manufacturer to shift its burden of paying for defective merchandise to the employer through the employer's worker's compensation insurance carrier, which ultimately increases costs of production and operates to decrease worker salaries. This section also reduces the damage award to which the injured party is entitled by percentages of negligence attributable to a co-employee or employer. This means that in certain situations, a severely injured worker who is the innocent victim of a defective product may be prohibited from any recovery at all if his co-employee and employer are found negligent. It further destroys the traditional concepts of joint and several liability and will render impossible the application of the law in cases involving both product liability and non-product liability. Joinder of defendants in product liability cases with defendants in non-product liability cases will be impossible unless State law is made to conform to the Bill.

6. Section 11 also requires that an injured worker exhaust remedies under the State worker's compensation law before a product liability suit can be initiated. The probable result of such a requirement will be to so protract product liability litigation that it will be extremely difficult to recover anything once the matter is finally brought to trial.

7. Section 12(a) imposes a 25-year statute of limitations on actions involving all capital goods except motor vehicles, running from the date of delivery to the initial user with few non-consequential exceptions. It is well-known to all consumers and working people that most capital goods have a useful life expectancy in excess of 25 years. Therefore, the proposed Act would eliminate many claims for relief prior to the expiration of the useful life of the product and prior to the actual existence of the claim. In this respect, the Act is unprecedented—I know of no other law which operates to eliminate a claim before it comes into being.

In the State of Wisconsin, a coalition of insurance and manufacturing industries attempted to introduce product liability legislation similar to Senate Bill No. 44.

Through letter writing and testifying before legislative committees, organized labor and consumer groups in Wisconsin were successful in stopping such legislation. It would certainly be a tragedy if such legislation were now foisted on the citizens of the State of Wisconsin by one of their own Senators, after they have so val-

iantly fought off similar efforts by the manufacturing and insurance industries in their own State.

Very truly yours,

LARRY B. BRUEGGEMAN.

BOLTZ & WHETTER,
ATTORNEY AT LAW,
Green Bay, Wis., July 12, 1983.

HON. ROBERT W. KASTEN, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: Thank you for your invitation inviting me to write a written statement for the record on the specific merits of S. 44. This piece of legislation is reminiscent of the so-called automobile no-fault proposal on a national basis. Fortunately, this Federal Legislation was defeated as it has now been shown that a crisis didn't exist. Some of the States that hastily passed no-fault legislation are now trying to extricate themselves from their situation. Another example of a crisis which you are familiar with is the medical malpractice "crisis" that supposedly existed in Wisconsin which resulted in legislation. Since that time, it has become apparent that there was no "crisis" and the health providers were being charged unnecessary high rates without any real basis for such rates.

The same thing has occurred in the Products liability field. The insurance carriers set high Product Liability insurance rates, as you as you stated in your opening remarks when the bill was brought before the Senate on January 26th of 1983. It would seem that again the barn is being burned down to kill the mouse. If any Federal Legislation is needed, it should be in the area of requiring the insurance companies to establish their rates for their insurance based upon their exposure, costs and reserves for claims made. However, much juggling can be accomplished by the insurance carriers even in those areas as was demonstrated by all of the information developed when the no-fault insurance issue was in vogue.

Unfortunately this letter is being written by an Attorney who is promptly going to be accused of having a financial interest in the outcome of this legislation because the Attorney may represent injured parties. Unfortunately, you are not going to hear a single word from those persons who are being directly affected by this proposed Bill. Those persons are the injured people who are going to be injured in the future if this Bill is passed. It will then be up to the Attorneys throughout the United States to explain why they have no claim or if they do have a claim that the expense of trying to litigate the matter under the Federal Legislation is so prohibitive that it has the same affect of them having no claim at all. Those people you will not hear from because they have not yet been injured by manufacturers and sellers negligent actions. The obvious reply to this argument is that the door to the Courthouse is still open to those who have claims, but after reading the Bill, the door is not open very far. Your opening remarks indicated that this Bill is beneficial to the economy and is beneficial to consumers. This Bill is detrimental to consumers, not only those who are injured, but those consumers who are buying products that easily could be made more safe, but are not made more safe because of the protective nature of this kind of legislation.

This area of the law has not been riddled with conflicts and confusion as stated in your opening remarks. Products Liability has been developed quite uniformly considering that 50 States have had a go at it. Having been a former member of the National Commission on State Uniform Laws, I wonder why this legislation was not given to that Commission and that the Commission developed a proposed uniform law if some States feel that they desperately need such a uniform law. Having been on the Commission, I assume that the Commission has been working on the proposed uniform law, but it probably isn't moving rapidly enough for the various manufacturers and sellers associations.

I note another statement made in the preliminary remarks before presenting this to the Senate and that statement was because of the current system that "manufacturers have less incentive to develop new products or to improve the safety of old ones." What has really happened as a result of products liability litigation is that manufacturers who formerly had no safety control, now are interested in having safety be a part of their development process. Furthermore, the changes made on unsafe products are promptly made by a manufacturer at this time, but if this legislation is passed, then there is less incentive for such safety consciousness on the part of the manufacturer or the seller, for that matter. All this safety consciousness

on the part of the manufacturers didn't just come about because they wanted their product to be safe, they just did not want to get sued for an unsafe or defective product.

Wisconsin has a long and established history in the products liability field. Wisconsin has as fair a system in relation to products liability litigation as any State in the Union. There are many States which have similar situations. Federal Legislation is not needed. If this bill is passed, not only will it be a mistake, but history will demonstrate the unfairness to the public of a law passed mainly to serve the special interests of the manufacturers and the insurance carriers.

I know that others have commented specifically upon the various Sections of this Bill that relate to the injured parties burden of proof, the requirement that the Manufacturer knew or should have known of the danger of the product, the eroding away of the strict liability concept in claims based upon failure to warn, the unusual provisions regarding proof of negligence on the part of a wholesaler or retailer, the unusual provisions regarding cases involving worker's compensation and the Statute of Limitations. I do not want to be a party to attempt to rewrite what I consider a bad concept to begin with.

The only beneficiaries of this legislation are the manufacturers and the insurance carriers to the detriment of the consumers and especially the people who are going to be injured in the future. There are other ways to get rid of the mouse without an attack upon the entire system.

It is my understanding that the Wisconsin Joint Council of Teamsters No. 39 and the Wisconsin State AFL-CIO, both of which consist of some 40,000 union members are opposed to this legislation. This should tell Congress something.

In my years on this earth, one thing has become crystal clear and that is that the squeaking wheel gets the grease and in this situation, the manufacturers and insurance companies are mightily struggling to be first in line to get the grease, while unfortunately, the ones that need the most protection can't even come before Congress to protest, because they are the ones who are going to be injured in the future and it won't be Congressmen telling them why the situation is like it is, it will be people like the undersigned trying to explain that someone somewhere thought they knew better than they did and scrapped a very workable, existing system. The system may need some repair here and there and it will be repaired by the States and by the Courts without the intervention of the Federal Government.

Very truly yours,

RICHARD A. BOLTZ.

O'CONNOR & WARREN,
ATTORNEYS AT LAW,
Kenosha, Wis., July 13, 1983.

Senator ROBERT W. KASTEN, Jr.,
Committee on Commerce, Science and Transportation,
Senate Hart Building, Washington, D.C.

DEAR SENATOR KASTEN: I have been advised that you are asking for further committee hearings on product liability and tort reform legislation entitled SB-44, and that those hearings be closed to the public.

I firmly disagree with the idea that because certain states are not responsibly handling product liability cases, that the people of the State of Wisconsin have to be punished. I am an attorney that does both plaintiff and defense personal injury work and believe that I have some sense of perspective having worked both sides of the fence. The vast majority of safeguards that have been implemented in consumer products are due directly to the success of personal injury actions throughout the country. A vast federal bureaucracy setting standards for all consumer products is the only alternative to our present system. In my opinion, that federal bureaucracy could never do the job that our current products liability law does to insure consumer safety.

In the hearings held to date the manufacturing interests have been represented much more heavily than consumer groups and members of the Bar Association.

Wisconsin has both a responsible legal system and a legislature capable of protecting Wisconsin Manufacturers and those people who responsibly sell products in our State. No federal legislation is necessary to protect responsible manufacturers who do business in the State of Wisconsin.

Please place this letter into the record with regard to this bill.

Very truly yours,

JOHN V. O'CONNOR.

[The following letter was sent to the Attorney General, the Secretaries of Commerce, Labor, and Transportation, the Director of OMB, and the Chairman of the Council of Economic Advisers.]

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C., June 24, 1983.

HON. WILLIAM FRENCH SMITH,
Attorney General, Department of Justice,
Washington, D.C.

DEAR ATTORNEY GENERAL SMITH: During the last session of the 97th Congress, the Committee was pleased to receive testimony from Secretary of Commerce Baldrige on the general concept of Federal product liability legislation. Subsequently, on July 15, 1982 the full Cabinet directed the Cabinet Council on Commerce and Trade, chaired by Secretary Baldrige, to form a working group to study the merits of S. 2631, the "Product Liability Act." By letter of September 9, 1982, Secretary Baldrige wrote to Senator Kasten indicating that the Cabinet Council working group had identified a number of areas in S. 2631 which the Administration believed should be clarified, modified or deleted.

As you know, S. 2631 was subsequently amended in accordance with a number of the Administration's recommendations and was then reported favorably from the Senate Committee on Commerce, Science and Transportation on October 1, 1982. On January 26, 1983 Senator Kasten reintroduced the "Product Liability Act" (S. 44), a bill identical to S. 2631 reported by the Committee.

Recently, it has been reported that the Administration is divided at this time concerning the desirability of Federal product liability legislation. We are therefore requesting your comments on the need for Federal legislation in this area, the wisdom of Federal preemption of state product liability laws, and the approach taken by S. 44. In addition, we would appreciate your views on the following specific provisions:

- (1) the standards of responsibility relating to products that may be unreasonably dangerous in design or because of a failure to warn;
- (2) the elimination of subrogation and indemnification rights and the potential cost to the Federal government;
- (3) the requirement that judges, rather than juries, determine punitive damage awards in product liability actions;
- (4) the statute of repose for capital goods;
- (5) the elimination of collateral estoppel in product liability actions;
- (6) the standard of responsibility for retailers and distributors;
- (7) the treatment of liability where more than one defendant is responsible for harm; and
- (8) the expansion of the definition and application of the defenses of misuse, alteration, modification, contributory negligence, and assumption of risk.

Thank you for your cooperation. We look forward to receiving your response as quickly as possible.

Cordially,

BOB PACKWOOD.
BOB KASTEN.
ERNEST F. HOLLINGS.
U.S. Senators.

THE SECRETARY OF COMMERCE,
Washington, D.C., July 20, 1983.

HON. BOB PACKWOOD,
Chairman, Senate Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the Administration, I am replying to your recent letters to the Attorney General, the Secretaries of Labor, and Transportation, the Director of OMB, the Chairman of the Council of Economic Advisers and me which requested our views on the need for federal product liability legislation, the wisdom of federal preemption of state product liability laws, and the approach to federal product liability law taken by the "Product Liability Act" introduced by Senator Kasten.

Last year the Administration, through the Cabinet Council on Commerce and Trade, carefully reviewed the need for federal product liability legislation, as well as the basic principles that such legislation should incorporate. The Administration's position on the need for federal product liability legislation, and its conclusions re-

garding the provisions of Senator Kasten's bill, are embodied in my letter of September 9, 1982, to Senator Kasten.

In that letter, I indicated that the "Product Liability Act" "fairly and equitably balances the rights and obligations of all interested parties and should contribute significantly to ending the product liability abuses currently facing so many companies." I also noted that the bill "is generally consistent with the basic principles which the President established to guide the Cabinet Council in implementing his decision of July 15 to support the concept of Federal legislation establishing uniform product liability standards."

There is nothing in the latest draft of the "Product Liability Act" that diminishes our support for federal product liability legislation or the approach taken by Senator Kasten's bill. The Administration continues to support the enactment of federal product liability legislation, and believes that the "Product Liability Act" reflects the basic principles any such legislation should incorporate.

The Administration believes that federal product liability legislation is consistent with the principles of federalism. Because of the interstate movement of products, any one state's product liability law uniquely affects producers and consumers throughout the entire nation. Presently, however, state forums cannot entirely balance the diverse and competing interests in this area—including the interests of interstate commerce. Thus, manufacturers and consumers in one state may find their own choices limited by the product liability law of another state, even though they may have no opportunity to participate in the latter state's lawmaking process. Moreover, because states ultimately realize that they cannot in their product liability law protect their own manufacturers, but can only advance the interests of those citizens who may be potential plaintiffs, state product liability law may at times be skewed in a manner that does not reflect the actual interests involved. The availability of a federal forum to balance all these competing interests thus is consistent with the aims of federalism. These considerations argue strongly for federal legislation in the product liability area.

Our review of the latest draft of Senator Kasten's "Product Liability Act" has revealed some questions regarding the technical adequacy and the effects of certain of its provisions. But none of these considerations jeopardize the Administration's support for the approach taken by Senator Kasten's "Product Liability Act", and our confidence that our questions can be resolved quickly.

This Congress presents a real opportunity for the enactment of federal product liability legislation. We hope that this opportunity can be realized, and we urge you to proceed with consideration of this important piece of legislation as expeditiously as possible.

I have been advised by the Office of Management and Budget that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

MALCOLM BALDRIGE,
Secretary of Commerce.

LAW OFFICES,
FALE, FALE & HEMSING,
Sheboygan, Wis., July 26, 1983.

ROBERT W. KASTEN, Jr.,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR KASTEN: I acknowledge your communication of July 1st, 1983, which asked for a response up until July 15.

Due to my trial calendar and vacation schedule, I did not see this communication or be in a position to respond to it until the 18th. Since that date was beyond the date you agreed to hold the record open until (July 15) I did not see any immediate need to then go into detail as to my reasoning for opposing the bill (S. 44) that has become so anti-consumer, in my opinion.

Nevertheless, I would like this letter to reflect the fact that although the time for me to personally respond in any great detail has passed that I would like to join in any of the recommendations that have been presented to you by Attorney Robert Habush, Attorney Warshafsky and my other distinguished colleagues who are members of the Wisconsin Academy of Trial Lawyers.

I trust that you are aware that we all hold on to a common thread in opposing this bill for the reason that it is particularly unfair to the consumer.

I want you to understand completely that I am in opposition to this and any other law that attempts to limit the remedies of a consumer regardless of whether it is a product's liability, law or anything else that is going to directly or indirectly affect the consumer.

Incidentally, my practice primarily centers around family law and litigation in general with little emphasis on product liability so I do speak truly on behalf of the consumer.

Thank you for attention to this matter.

Very truly yours,

WILLIAM F. FALE.

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